COURT OF APPEALS
DECISION
DATED AND FILED

December 29, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP630 **Cir. Ct. No. 2003CV830**

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

ROGER BINDL,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

NEXT LEVEL COMMUNICATIONS, INC.,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Dane County: DANIEL L. LaROCQUE, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront, and Deininger, J.J.

¶1 VERGERONT, J. This appeal and cross-appeal concern a dispute over the amounts, if any, that are owed Roger Bindl under his employment contract with Next Level Communications, Inc. Following a jury trial, the circuit court entered a judgment on the verdict in Bindl's favor for $48,699.35 plus costs on his breach of contract claims. The circuit court also entered two orders denying Bindl's postverdict motions: one motion seeking attorney fees under WIS. STAT.

§ 109.03(6)[1] for violation of WIS. STAT. ch. 109, governing wage claims, and another motion for double costs and 12% statutory interest on the judgment under WIS. STAT. § 807.01(3) and (4). Bindl appeals the orders denying these postverdict motions. We conclude the court did not err in denying these motions. Accordingly, we affirm on the appeal.

¶2 Next Level cross-appeals the judgment against it and the court's order denying its postverdict motions. Next Level argues that it is entitled to a new trial on the question whether it breached its employment contract with respect to the payment of commission on three accounts because the court erroneously admitted certain expert testimony presented by Bindl. Next Level also contends there was insufficient evidence to support the jury's findings on damages regarding two of those accounts and on other breach of contract claims. We conclude there was sufficient credible evidence to support the jury's verdict on all these findings. Accordingly, we affirm on the cross-appeal.

BACKGROUND

¶3 Next Level sells high speed telecommunications equipment nationwide to telephone companies, public utilities, and other customers. Bindl was hired by Next Level in 1999 as a regional account manager, and his position involved overseeing accounts in four Midwestern states. His compensation consisted of a salary and sales commission and, according to Bindl, possibly bonuses. On July 1, 2001,[2] Bindl was promoted to the position of Director of

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] Next Level's records contain both a June 1, 2001 and a July 1, 2001 effective date for Bind's promotion; he testified that he was a sales director (another name for regional account manager) in the first half of 2001. Therefore we use July 1, 2001, as the effective date of his promotion.

Sales, Engineering and Consulting Companies. According to Bindl, there was an agreement that, in addition to a salary and commission, his compensation in this position was to be based on his participation in Next Level's MBO (management by objective) program.

¶4 Next Level terminated Bindl's employment in October 2002. Bindl subsequently filed this action alleging that Next Level breached its employment contract with him when it: (1) failed to pay him commission for sales to the Hutchinson Telephone Company account; (2) failed to pay him commission for sales to the Wood County Telephone and Chibardun accounts; (3) improperly deducted a $5,000 bonus it had paid him from the commission it owed him; and, (4) breached the terms of compensation of the MBO program. Bindl's complaint also alleged a promissory estoppel claim based on Next Level's breach of the MBO program's terms.[3] Next Level denied that it owed Bindl any compensation. Its position at trial was that the parties had agreed that the Hutchinson, Wood County, and Chibardun accounts would be excluded from Bindl's territory and, thus, he would not receive commission on those sales; in addition, Next Level disputed the amount of commission from those sales. With respect to the $5,000 bonus, Next Level's position was that it properly deducted this amount from commission increases that it was not obligated to pay him. As for the MBO program, Next Level disputed that there was an agreement on the terms of Bindl's compensation under this program and disputed the amount owed Bindl even if there were such an agreement.

[3] The complaint also alleged that Next Level's deduction of the $5,000 bonus violated WIS. STAT. § 103.457, which governs listing deductions from wages; however, this issue did not go to the jury and is not relevant to this appeal. In addition, the complaint alleged Next Level breached the fiduciary duties of good faith and fair dealing when it withdrew Bindl's severance package because he refused to give up his claims for unpaid wages. This claim did not go to the jury either and is not relevant to this appeal.

¶5 The jury returned a special verdict finding that Next Level breached its employment contract with Bindl with respect to commission on sales to Hutchinson, Wood County, and Chibardun and with respect to the $5,000 bonus. It awarded damages of $11,590.22 for the Hutchinson account, $2,109.13 for the Wood County and Chibardun accounts, and $5,000 for the bonus payment. The jury also found that Next Level and Bindl had an agreement with regard to the MBO program compensation package, Next Level breached this agreement, and $30,000 would fairly and reasonably compensate Bindl for damages he sustained as a result of that breach. Because the jury decided in favor of Bindl with respect to the MBO agreement based on his breach of contract claim, it did not, as instructed, reach the verdict question on the promissory estoppel claim.

¶6 After trial, Bindl filed postverdict motions requesting attorney fees pursuant to WIS. STAT. § 109.03(6), and double costs and 12% interest under WIS. STAT. § 807.01. Next Level also filed postverdict motions. It asserted that the circuit court had erroneously admitted the testimony of Bindl's expert, Darin LaCoursiere, and it was therefore entitled to a new trial on the questions whether it had breached the employment contract regarding commission sales to Hutchinson, Wood County, and Chibardun. Next Level also contended that there was insufficient credible evidence to support the jury's verdict on the other questions and it was entitled either to a new trial or judgment as a matter of law that it owed Bindl nothing.[4] The circuit court denied the postverdict motions of both parties.

[4] Next Level had moved for a dismissal after the close of Bindl's case and for a directed verdict at the close of all evidence; the court denied the motions on some issues and reserved a ruling on others.

DISCUSSION

¶7 Because it is necessary to decide the issues Bindl raises on appeal only if Next Level does not succeed on its cross-appeal, we address the cross-appeal first.

I. Cross-Appeal

A. Expert Testimony

¶8 Next Level argues that the circuit court erroneously admitted the testimony of LaCoursiere, Bindl's expert witness, on the practice in the industry for defining the accounts to be excluded from a salesperson's territory when making employment offers. Our scope of review on this issue is deferential: we affirm a circuit court's rulings admitting or excluding evidence if the circuit court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

¶9 One of the disputes between the parties was whether they had agreed when Bindl was hired, as Next Level contended, that the Hutchinson, Wood County, and Chibardun accounts were excluded from Bindl's territory. The April 26, 1999 letter offering Bindl employment stated "Your responsibilities will include account management in WI, MN, ND and SD."[5] Bindl's position at trial was that those terms indicate that the parties' intent was that he would receive

[5] The April 26, 1999 letter stated "Re: Revised Employment Terms" and also stated that it "supercede[s] any other agreements or promises made to you by anyone, whether oral or written." The employment terms of the April 26 letter are identical to those in a letter dated April 19, except that a provision for taking ten days off in December 1999 has been added to the later letter. In this opinion, we will refer to the April 26, 1999 letter as the April 1999 employment letter.

commission on sales to all the accounts in the geographic area assigned to him, including those three accounts because they were located in that area and were not excluded in the letter. To support its position that those accounts were not included, Next Level presented the deposition testimony of Bindl's former supervisor, Mark Barlow. Barlow testified that he told Bindl during the interview process that those three accounts would not be part of his territory because another salesperson was servicing these accounts. However, Bindl testified that he was never told during the interview process that he would not be receiving commission on those accounts and, after being hired, he "serviced" the Wood County and Chibardun accounts, which involved visiting the accounts and selling them products and services. Bindl also testified that other salespeople besides himself helped service other accounts in his geographic area during 1999 and 2000 and he received commission for all these accounts, except Hutchinson, Wood County, and Chibardun.

¶10 In his deposition, read at trial, LaCoursiere testified that he owns an executive recruiting franchise in Michigan, many of his clients are telecommunications companies, and that he is involved in many of the offer and acceptance processes between his clients and the employee-candidates he finds for them. Prior to owning the recruiting franchise, LaCoursiere worked for several telecommunications companies over approximately fourteen years, and held various positions within these companies, including one in which he was in charge of hiring sales personnel. LaCoursiere testified that there was a practice in the telecommunications industry of explicitly listing accounts that are located within a salesperson's assigned geographic territory that are exempt from his or her commission, and that, in his experience, employers list these excluded accounts on a new salesperson's employment offer 90% of the time.

¶11 Prior to trial, Next Level moved to prevent Bindl from presenting LaCoursiere's deposition at trial, arguing that the standard practice in the industry had no relevance to the jury's determination of the terms of the contractual agreement between Next Level and Bindl. Next Level also contended that, because LaCoursiere had no knowledge of the specific contract between Next Level and Bindl, his testimony lacked foundation.

¶12 The circuit court denied Next Level's motion. It concluded that LaCoursiere's testimony regarding the practice in the industry was relevant to the parties' intent and [a person with] experience and practice should be permitted to testify on the industry practice. However, the court excluded any references to an industry standard, stating that a violation of a standard "implies … a violation of law," which was not an issue in the case. When Next Level renewed its objection to LaCoursiere's testimony in its postverdict motion, the court reaffirmed its earlier conclusion and elaborated on it. The court referred to the definition of relevant in WIS. STAT. § 904.01[6] and explained that, because the parties' testimony on what each intended with respect to the three accounts was in direct conflict, evidence on the practice in the industry made Bindl's version more probable.

¶13 We conclude the circuit court properly exercised its discretion in admitting LaCoursiere's testimony. The court correctly identified the issue in dispute—the parties' intent with respect to whether Bindl was to receive

[6] WISCONSIN STAT. § 904.01 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

commission on the three accounts. Next Level implicitly concedes that evidence extrinsic to the written offer of employment was proper on this issue, because it presented Barlow's testimony on his conversation with Bindl to show what Next Level intended. *See* ***Energy Complexes, Inc. v. Eau Claire County***, 152 Wis. 2d 453, 467-69, 449 N.W.2d 35 (1989) (if a contract is reasonably susceptible to more than one meaning, extrinsic evidence may be admitted to help determine the parties' intent, and their intent is a factual issue for the trier of fact to resolve).

¶14 The circuit court's conclusion that the industry practice was relevant was consistent with applicable law and was reasonable given the facts of this case. In ***Columbia Propane, L.P. v. Wisconsin Gas Co***., 2003 WI 38, ¶¶12, 25, 261 Wis. 2d 70, 661 N.W.2d 776, the supreme court took into account established practices in the relevant business community in deciding both whether a contract was ambiguous and, assuming it was, which construction was the more reasonable. The court here could reasonably decide that, if the industry practice were as LaCoursiere testified, that fact tended to make it was less likely that Next Level, a nationwide telecommunications company, would rely on a conversation to convey its intent that certain accounts were to be excluded from commission even though those accounts were in the territory described in the written employment agreement.

¶15 Next Level's argument that LaCoursiere did not have an adequate foundation to testify because he did not know about the intent of these particular parties is simply a restatement of its objection based on relevance. Next Level does not argue that LaCoursiere did not have sufficient knowledge or experience to testify as an expert under WIS. STAT. § 907.02[7] on industry practice, but, rather,

[7] WISCONSIN STAT. § 907.02 provides:

that industry practice is not relevant to the intent of these particular parties. As we have already concluded, the circuit court properly exercised its discretion in concluding that this testimony was relevant.

B. Breach of Contract – Sufficiency of the Evidence

¶16 Next Level contends there was insufficient evidence to support the jury's findings that: (1) damages for breach of the employment contract with respect to the Wood County and Chibardun accounts are $2,109.13;[8] (2) Next Level breached an employment contract with Bindl with respect to the bonus payment of $5,000; and (3) (a) Next Level and Bindl reached an agreement with regard to the MBO compensation package, (b) Next Level breached this agreement, and (c) $30,000 is fair and reasonable compensation for that breach.

¶17 Our review of a jury's verdict is narrow. ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. We sustain a jury's verdict if there is any credible evidence that supports it, even if that evidence is contradicted and the contradictory evidence is more convincing. ***Id.***, ¶¶38-39 (citations omitted). In our analysis, we view the evidence and all reasonable inferences in the light most favorable to the jury's verdict. ***Id.***, ¶39. Our standard of review is even more stringent when, as here, the circuit court has approved the jury's verdict. ***Id.***, ¶40. In this situation, we will overturn the jury's verdict only

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> **Testimony by experts**. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[8] In its reply brief, Next Level explains that it is no longer asking that the answer regarding damages for the Hutchinson account be changed.

if "there is such a complete failure of proof that the verdict must be based on speculation." ***Id***. (citation omitted). We conduct our analysis of the evidence in the context of the instructions given to the jury. ***Kovalic v. DEC Intern., Inc***., 161 Wis. 2d 863, 873 n.7, 469 N.W.2d 224 (Ct. App. 1991).

1. Commission on the Wood County, Chibardun, and Hutchinson[9] Accounts

¶18 Next Level first argues that, even if the jury found that the parties initially agreed that Bindl was to be paid commission for sales made to Hutchinson, Wood County, and Chibardun, Bindl was an at-will employee, and, therefore, Next Level could change the terms of his employment at any time.[10] According to Next Level, September 1999 e-mails between Bindl and Barlow shows that Next Level informed Bindl that he would not be paid commission on those accounts, and this changed the terms of his employment from September 1999 forward. The jury was instructed:

> A contract that is terminable at will permits an employer to make changes in the employment relationship such as changes in salaries, hours or job responsibilities without the consent of the employee. However, the employee must be notified of any changes in the terms of the employment prior to their implementation.

¶19 In addition to the testimony of Bindl and LaCoursiere summarized in paragraphs 9 and 10 above, Bindl presented the videotaped deposition of Joseph

[9] Although, as noted in footnote 8, Next Level states in its reply brief that it is no longer asking that the answer regarding damages for the Hutchinson account be changed, its explanation suggests that it is still contending that the September 1999 e-mail changed the terms of Bind's employment with respect to all three accounts. Therefore, we include the Hutchinson account in the heading of this section and in our discussion of the September 1999 e-mails, but not in paragraphs 22-26, which discuss the amount of damages.

[10] Bindl testified that he understood that he was an employee at will, that is, that Next Level could terminate or modify his employment as it chose. The April 1999 employment letter did not specify the duration of employment.

Felix, a former employee of Next Level. Felix testified that he was involved in Bindl's hiring process, but was not his direct supervisor when Bindl was hired; rather, he supervised Barlow, who was Bindl's direct supervisor at the time he was hired. According to Felix, Bindl was to be paid on all accounts within the geographic area that he was hired to cover. Felix testified that he would have had to approve a decision by Barlow to stop paying Bindl commission on the Hutchinson, Wood County, and Chibardun accounts, and he did not do so.

¶20 The September 1999 e-mails on which Next Level relies contain Bindl's complaints to Barlow that he was not receiving commission on the three accounts, and Barlow's responses to Bindl, which include reference to having told Bindl, before he was hired, that these accounts would be given to him at some time to be determined. The relevant portions of the e-mails are set forth in the accompanying footnote, with Bindl's messages in plain text and Barlow's responses in italics.[11]

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[11]

> I was recruited to cover WI, MN, ND & SD and lured by new accounts I knew well. On my third day, however, after 2 awkward days with Wood County [Telephone] …. I learned that WCT would transfer to me later. Shortly after … I learned that Chibardun, and Hutchinson would/might be transferred to me later on.
>
> ***[Barlow, Mark (Next Level-EX)]*** *Roger I disagree with above comment. Before you hired on I told you that these accounts would be handed off at a point in time to be determined. You will pickup Chibardun and Wood County at end of 3rd Qtr 99. Hutchinson is still under review.*
>
> I never got a good explanation on the reason for this transfer delay, but learned that the real issue was commissions – not getting paid till shipments were made. And, people might get cheated out of money.

¶21 The testimony of Bindl, Felix, and LaCoursiere, if believed by the jury, was sufficient to establish that under the terms of employment offered to Bindl in April 1999 and accepted by him, he was to receive commission on the

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> ***[Barlow, Mark (Next Level-EX)]*** *Roger the reason was and still is that Tom Swan opened the accounts and made the sales. Also these accounts where* [sic] *at a point that a change in account managers may have caused slowing or loss of the sale.*
>
> Yesterday I found that my commissions were cut from even more accounts….
>
> ….
>
> This commissions deal is a problem, and I hope you guys can make it good ….
>
> **[*Barlow, Mark (Next Level-EX)]*** *…This territory as well as* [*Next Level*] *is in an extreme state of growth and flux. We don't have all of our ducks in a row and probable wont* [sic] *for sometime. I can assure you that this change will continue and all of us will be involved.*
>
> This slow transfer of accounts also causes awkwardness for me …. I'm working with people on all sides of Wood County, Chibardun and Hutchinson, but I can't answer the questions about them because I'm out of the loop.
>
> **[*Barlow, Mark (Next Level-EX)]*** *…Again, you will pick up Wood County and Chibardun at the end of 3rd Qtr. 99.*
>
> … So let[s] fix this and go forward. … lets [sic] have more communication on what the plans are …
>
> ***[Barlow, Mark (Next Level-EX)]*** *This is my job and my goal. I need to set* [sic] *down with you and go over this. I will assure you if I have the say you will be rewarded for your work.*
>
> I do expect commissions on all these accounts – don't pass the problem down to me.
>
> **[Barlow, Mark (Next Level-EX)]** *Roger your* [sic] *doing a great job. Lets* [sic] *work this out between you and I from this point on ….*

Hutchinson, Wood County, and Chibardun accounts. While it is true that Barlow's testimony was in direct contradiction and Next Level's cross-examination of Bindl's witnesses suggested they were biased or not worthy of belief, it was the jury's role to choose which witnesses to believe. A reasonable jury could believe that Barlow had not told Bindl before he was hired that he would not get commission on the three accounts. A reasonable reading of the September 1999 e-mails, viewed most favorably to the verdict, is that it shows that Barlow had not told Bindl this, although Barlow was stating he had told him. Thus, as the circuit court stated in denying Next Level's postverdict motion, a reasonable jury could view the e-mails as evidence that there was a dispute between the parties over the terms on which Bindl was offered and accepted employment in April 1999. Under this reasonable view of the e-mails, they are not evidence that Barlow informed Bindl that Next Level was changing the terms of his employment in September 1999 and Bindl had to either accept those new terms or leave.

¶22 Next Level also argues that, even if the jury could properly find that it had agreed to pay Bindl commission on the Wood County and Chibardun accounts at the time it hired him, there was insufficient evidence for the jury to find that it owed him any commission on those accounts.

¶23 Bindl offered two exhibits to establish the amount of commission he was owed on these accounts. Exhibit 17 is titled "YTD Revenue by Region/Salesperson/Customer 1999 Orders taken to Revenue in 2000." Bindl's name is listed in the "salesperson" column and the exhibit shows a combined total of $38,750 for Wood County and Chibardun. The second exhibit offered by Bindl, exhibit 18, is titled "Wood County [an]d Chibardun orders booked in 1999 and s[hipp]ed in 2000" and states a combined total of $123,115.00. Bindl's name

does not appear on this document. Bindl testified that he was paid commission based on the amounts in exhibit 17 but not on the higher figure in exhibit 18. He acknowledged that other employees may also have serviced these two accounts or made sales to them but, he testified, he was nonetheless entitled to a commission on all sales on these accounts because they were in his geographic area and had not been excluded when he was hired.

¶24 Bindl argued to the jury that, if the jury determined that Next Level breached its contract with him with respect to the two accounts, then he was entitled as damages to a commission on $84,365, the difference between the combined totals on the two exhibits. Next Level argued to the jury, as it does on appeal, that exhibit 18 includes sales made to the two accounts by other employees, as well as Bindl, and therefore it is not a basis for determining the amount of commission he was owed on those accounts. The parties stipulated that, if the jury decided that it was appropriate to use the difference in sales as shown on the two exhibits to calculate damages, the damages would be $2,109.13.

¶25 We have already concluded that the jury could reasonably decide that Bindl's agreement with Next Level when he was hired was that he would receive commission on the two accounts because they were in his geographic area and were not excluded. His testimony and Felix's, if believed by a jury, were sufficient to support a finding that he was entitled to the commission whether or not he himself made the sales. Thus, the jury could reasonably decide to use exhibit 18 in determining damages. Next Level may be suggesting that exhibit 18 contained sales made before Bindl was hired, but it points to no evidence that establishes this, and, in any event, the jury could reasonably infer from Bindl's testimony these sales were made after Bindl began work in April 1999. This is also a reasonable inference from exhibit 18 itself, because these are sales that were

made, or booked, in 1999 but not shipped until 2000, suggesting that the sales occurred later rather than earlier in 1999.

¶26 We conclude there was sufficient credible evidence for the jury to find that Next Level breached its contract with Bindl with respect to the Hutchinson, Wood County, and Chibardun accounts and that the damages for the breach regarding the latter two accounts is $2,109.13.

2. $5,000 Bonus

¶27 Next Level argues that there is insufficient evidence to support the jury's finding that it breached its employment contract with Bindl with respect to a $5,000 bonus payment.

¶28 The evidence at trial established that Bindl had a revenue goal of $2,000,000 for 1999. Under the terms of the 1999 Sales Targets and Commission Plan (1999 commission plan), Next Level did not pay its sales personnel commission on sales generating revenue above 150% of a salesperson's revenue goal. Bindl exceeded his revenue goal for 1999, and, as a result, in February 2000 Next Level paid him a $5,000 bonus. The memo announcing the bonus informed Bindl that this was "an addendum to the commission notification you received for revenue shipped in the fourth quarter of 1999" and that Next Level was paying the bonus "[a]lthough the [1999 commission] plan does not pay for revenue shipped over the 150% target…." Bindl acknowledged at trial that Next Level did not have to pay him a bonus.

¶29 In a memo dated June 23, 2000, Next Level informed Bindl that it had decided to "revise the CY2000 NLC Sales Compensation Package" by eliminating the 150% cap so that salespersons could be "paid commission dollars

for CY1999 NLC Orders (actually earned) that are taken to NLC Revenue in CY 2000." Testimony established that Next Level paid its sales personnel 50% of the commission on a sale when the sale was booked and 50% of the commission when the product was shipped to the customer and Next Level could bill for the sale. The June 23, 2000 memo to Bindl explained that an attachment showed how the change affected his "CY2000 YTD Sales Compensation that was paid through May 2000." An exhibit numbered separately from the June 23, 2000 memo showed a commission analysis for Bindl both with and without the 150% cap on "FY1999 Orders going to Revenue in FY2000." The analysis shows both a 1999 commission summary and a 2000 commission summary. The 1999 commission summary is the same under both the cap and no-cap scenarios and contains the $5,000 bonus. The 2000 commission summary for 1999 orders yielding revenue in 2000 shows an increase of $68,227.65 in commission if the cap is removed; the $5,000 bonus has been deducted in calculating this amount.

¶30 Bindl acknowledged in his testimony at trial that Next Level was under no obligation to remove the 150% cap, but he argued to the jury that, because Next Level did not impose any conditions on the bonus when it gave it to him, it could not "take it back" by deducting it from the commission he was owed under the revised compensation package for 2000. Next Level argued in the circuit court, as it does on appeal, that, because Next Level was not obligated by contract either to pay the bonus or to remove the cap, it did not breach the contract when it deducted the $5,000 bonus from the recalculated commission payments.

¶31 While it is true that Next Level did not have a contractual obligation to give Bindl the bonus, the proper inquiry is whether and how its doing so altered the terms of the employment contract. A jury could reasonably infer from the memo announcing the bonus, from Bindl's 1999 commission plan, and from the

1999 commission summary on the recalculation analysis, that the bonus was for orders that were booked and shipped (or "going to revenue") in 1999. Because the memo announcing the bonus said nothing to the contrary, a jury could reasonably decide that Bindl accepted the bonus and continued to work with the understanding that the bonus was in addition to the compensation he was entitled to for 2000. The question then becomes whether the revision to the 2000 Sales Compensation Plan takes away a bonus already earned, thus violating the implicit agreement under which Bindl continued to work after he received it, or whether the revision simply gave him a smaller increased commission for 2000, an increase that Next Level was not obligated to give at all.[12]

¶32 The answer to this question is not clear because the relevant exhibits do not all use the same terms and do not explain all the calculations, and the trial testimony did not add clarity. There is evidence and reasonable inferences from the evidence that support what we understand to be Next Level's position—that the bonus was based on the same revenues that the recalculated commission was based on, so nothing was being taken away from Bindl; rather, overall he was receiving more commission for 2000. However, it is also reasonable to infer from the exhibits that the bonus was based on orders booked and shipped in 1999, and the recalculated commission without the cap was based on orders booked in 1999 and shipped in 2000. Under this view of the evidence, Next Level is taking away

[12] The jury was instructed, consistent with WIS JI—CIVIL 3024, that:

> An agreement may be established by the conduct of the parties without any words being expressed in writing or orally, if from such conduct it can fairly be inferred that the parties mutually intended to agree on all the terms. This type of agreement is known as an implied contract. An implied contract may rest partially on words expressed in connection with conduct or solely upon conduct.

the bonus by deducting it from the increased commission for 2000. We conclude that a jury could reasonably decide that this is a breach of an implicit agreement formed when Bindl accepted the bonus.

3. MBO Program

¶33 Next Level argues there is insufficient evidence that Bindl and Next Level reached an agreement on the terms of his compensation under the MBO program and, even if there were an agreement, no credible evidence supports the jury's determination that Bindl was owed $30,000. Because we view the evidence most favorably to the verdict, we focus on the evidence that supports the jury's findings.

¶34 Bindl testified that when he was promoted from regional account manager to director of sales, engineering and consulting companies, on July 1, 2001, the agreement was that he would receive a salary of $93,861—a $10,000 increase—and would be eligible for additional compensation in Next Level's MBO program. This program offered a participating employee the potential to double his or her salary: 75% of the additional potential compensation was based on an employee's completion of particular tasks, and 25% of the additional potential compensation was based on commission sales. Although the maximum an employee could earn annually for the task-based component of the MBO program was 75% of his or her base salary, the commission-based component of the MBO program was not capped, and 25% was only a goal. Felix, Bindl's direct supervisor after the promotion, sent Bindl tasks to complete and Bindl typed these tasks and information about them into a form. Either Felix told him, or he and Felix together agreed, how the completion of each task should be weighted, and Felix agreed with the weight each task was assigned on the form Bindl filled out.

According to Bindl, Felix agreed Bindl had completed 91% of the tasks assigned to him for the third quarter of 2001 and 79% of the tasks assigned to him for the fourth quarter of 2001, and Felix believed Bindl should be paid for the task-based component of the MBO program based on these completion rates. Bindl was never paid for completing the task-based component of the MBO program for the third or fourth quarters of 2001. He spoke with and sent e-mails to his supervisors in January 2002 requesting payment for the task-based portion of the MBO program.

¶35 Bindl calculated that Next Level owed him $29,918.18 for the task-based part of the MBO program, taking into account the maximum of 75% of his annual salary of $93,861 for completing 100% of the tasks assigned to him in the task-based component of the MBO program and the percentage of tasks he did complete in the third and fourth quarters of 2001.

¶36 Bindl was paid $17,701.63 for commission during 2001, and he was paid $20,598.64 in March 2002. According to Bindl, the total, $38,300.27, was the commission he was owed for 2001. Bindl did not claim that Next Level failed to pay him for the commission component of the MBO program.

¶37 The testimony of Felix was consistent with and supported Bindl's testimony. In particular, Felix testified that he assigned Bindl the tasks that Bindl needed to complete, determined what percentage of the tasks Bindl had completed, had the information to determine that Bindl had completed what was necessary, and submitted that information, including "backup documentation," to the appropriate individuals so that Bindl could be paid accordingly. Felix agreed that Bindl had completed 91% of the MBO tasks assigned to him for the third quarter of 2001 and 79% of those assigned for the fourth quarter. Felix's employment

was terminated by Next Level in January 2002, and at that time, neither Bindl nor anyone else in the MBO program (including Felix himself) had been compensated for completing the task-based portion of the MBO program in 2001, with the exception of two people who had been fired or terminated.

¶38 According to the evidence Next Level presented, Kevin Wiley took over supervision of the MBO program from Felix and became Bindl's supervisor in November 2001. About that time, Wiley and other management personnel at Next Level made a decision to hold off on any payments under the MBO program until Wiley had an opportunity to review the program. Based on this review, Next Level decided in early February 2002 to abandon the program and compensate those in the program as if 100% of the incentive, rather than just 25%, were based on commission. According to Wiley, the $20,598.84 Bindl received in 2002 was commission for the second half of 2001 under this restructured compensation program, and this resolution of what Bindl was owed under the entire MBO program was acceptable to Bindl. Bindl denied this.

¶39 In support of Next Level's argument that there was not a clear understanding of the terms of Bindl's compensation under the MBO program, Next Level relies on portions of Bindl's deposition, read at trial, in which he agreed that when he accepted the promotion, he did not have "a firm understanding of how the MBO's were going to be calculated" and he did not have this understanding until "[r]oughly in the middle of it.…" However, a reasonable jury could reconcile this with Bindl's testimony at trial by determining that, when he accepted the promotion there was an agreement that he could earn up to 75% of his salary on the task-based portion and 25% on the commission portion, but he did not have an understanding until a later point exactly how the performance on tasks would be translated into compensation.

¶40 In support of Next Level's argument that, even if there were an agreement to compensate Bindl under the MBO program, there is insufficient credible evidence to support the jury's verdict that Bindl is owed $30,000, Next Level first disputes the terms of the program. Next Level points to Wiley's testimony that the program established $75,000 as the maximum compensation available in addition to salary—75% task-based and 25% commission-based—and to the testimony of Susan Gentile, who, at the time of trial, was a controller for Motorola, which had acquired Next Level. However, Wiley qualified his testimony by saying that this was his understanding based on his review of documents, and Gentile testified that her testimony on this point was based on Wiley's testimony and on her review of Next Level's records on Bindl's compensation. Gentile had not been in charge of preparing or keeping the accounts of Bindl's compensation in 2001. Thus, a reasonable jury could decide that Bindl's testimony and Felix's testimony—the two persons who were involved in the discussion of the compensation terms, the latter on behalf of Next Level—were more credible.

¶41 Next Level also asserts that Bindl's answers to interrogatories and a document he prepared both support Next Level's position that the maximum additional income available to Bindl under the MBO program was $75,000, not 100% of his salary, divided 75/25 between tasks and commission. However, neither of these pieces of evidence are clear on this point, and Bindl explained them at trial. It was the jury's role to decide whether or not to accept these explanations and reconcile any inconsistencies in Bindl's favor. Ultimately, the jury was faced with Next Level arguing on the one hand that there was no clear agreement on the terms of additional compensation under the MBO program and, on the other hand, that, if there was an agreement, it was not what Bindl and Felix

testified it was. We are satisfied that a reasonable jury could credit Bindl's and Felix's trial testimony rather than the contradictory evidence.

¶42 Next Level's second challenge to the $30,000 award is based on its assertion that no evidence supports Bindl's testimony that the $20,598.84 payment was for commission for 2001 and did not include any portion that was compensation for the task-based component of the MBO program. Next Level points out that, even under Bindl's trial testimony on the MBO program, he was eligible for commission under that program of at most $11,732.63 for the six months he was in the program (25% of $93,861 divided by two). Next Level also points to the commission checks totaling $6,053.18 that Bindl received during the second half of 2001, while Bindl was in the MBO program, and argues that this amount is consistent with a total potential commission of approximately $11,732.63 for the second half of 2001, given Gentile's testimony that the sales quota for the MBO program for 2001 was only 50% fulfilled.

¶43 Next Level's view of the evidence overlooks the contrary evidence and contrary reasonable inferences from the evidence that support the verdict. Bindl and Felix testified there was no cap on the 25% commission portion of the MBO program, and Bindl testified Next Level had indicated he met his sales quota under the MBO program. Bindl also testified that he received commission in the second half of 2001 for work performed in the first half of 2001, and that he was owed more in commission from the first half of 2001 than the $17,701.63 he had received by the end of 2001. His testimony on this point is supported by the uncontradicted evidence that, before he was promoted, 50% of his commission was paid when a sale was booked and 50% when it was shipped. It is also supported by his testimony that in 2000, in the same position he held in the first half of 2001, he earned $200,000 in commission, and by Next Level's own records

that reasonably suggest Bindl's testimony on this point is accurate. Finally, although both Wiley and Gentile testified that the $20,598.84 payment included an amount to compensate for the discontinued task-based component of the MBO program, both acknowledged they did not know how that amount was calculated, and no exhibit explains that. Indeed, Next Level's own record shows that Bindl was paid $17,701.63 in commission in 2001 and was due $20,598.84 in commission for 2001, without identifying the $20,598.84 as anything other than commission due for 2001. Thus, a reasonable jury could view this exhibit as supporting Bindl's testimony.

¶44 We conclude there is sufficient credible evidence for a reasonable jury to decide that Bindl was owed $30,000 (rounding up the $29,918.18 as calculated by Bindl) for the task-based component of the MBO program.

II. Appeal

A. Motion to Amend Complaint

¶45 As noted above, the complaint alleged four claims for breach of contract, a claim of promissory estoppel, a violation of WIS. STAT. § 103.457, which governs listing deductions from wages, and a claim for "breach of duty of good faith and fair dealing and breach of fiduciary duty." *See* footnote 3 above. The complaint demanded judgment in the amount of the unpaid compensation "together with statutory penalties, interest, costs and reasonable attorney fees." There was no reference in the complaint to WIS. STAT. ch. 109, which governs wage claims and provides that in an action by an employee against an employer, "the court may allow the prevailing party, in addition to all other costs, a reasonable sum for expenses…." WIS. STAT. § 109.03(6).

¶46 Four weeks before trial, Bindl made a settlement offer to Next Level for "$41,999.00, plus plaintiff's taxable costs and reasonable attorney fees." There was no reference to WIS. STAT. ch. 109 in this offer. Next Level did not accept this offer. The first time the record reflects that ch. 109 was discussed was the morning of trial, in the context of a hearing on Next Level's motion to exclude evidence relating to punitive damages. The court agreed with Next Level that the complaint did not state a claim for a tort based on a duty independent from the employment contract and, in addition, the conduct alleged of withholding wages was not of the type that would support punitive damages. In the context of discussing Next Level's duty as an employer, the court indicated that, although there might be a statute that would allow prosecution for withholding wages, and, perhaps, salary and commission, that would be a criminal matter and, in any event, it was not pleaded. In response, Bindl's counsel stated that, although ch. 109 was not specifically mentioned in the complaint, the complaint is "obviously in the nature of a wage claim," and if Bindl prevailed he would be asking for attorney fees under WIS. STAT. § 109.03. Next Level objected that Bindl had not pleaded a claim under ch. 109. The court declined to resolve the issue at that time, stating that "if it only involves the issue of attorney fees, I guess the court could [liberally][13] construe the pleadings or allow amendments. I'll consider a motion to amend at some point if it becomes relevant."

¶47 Approximately three weeks after the jury returned the verdict and before the court had resolved the postverdict motions, Bindl moved the court to award him attorney fees under WIS. STAT. § 109.03. Bindl argued that the

[13] Although the transcript says "literally construe the pleadings," we understand the court to have said "liberally" instead of "literally," given the other comments the court made about a wage claim and the complaint.

complaint, liberally construed, stated a wage claim, but, if the court decided it did not, then the court should grant leave to amend the complaint under WIS. STAT. § 802.09(1).[14] Bindl asserted that Next Level would not be unfairly surprised because the complaint gave notice that he was seeking wages due but unpaid and he had "specifically raised [this] at mediation and throughout settlement negotiations…." Next Level responded that the complaint did not contain a cause of action for a violation of WIS. STAT. ch. 109, and the court should not allow a motion to amend at this late date, because Next Level would be prejudiced if the court did so. Next Level pointed out that it had made an offer of settlement in August 2003 that did not include attorney fees; it had not accepted Bindl's September 2004 offer of settlement in part because that did include attorney fees; it had made known its position at the hearing on the motions in limine that the complaint did not contain a wage claim; and the court at that time had indicated that Bindl could seek a leave to amend, but Bindl had not done so until this motion three weeks after the jury verdict. An award of attorney fees, Next Level asserted, would have the effect of doubling the judgment against it.

¶48 The circuit court denied Bindl's motion. The court noted that under WIS. STAT. § 802.09(1) the court is to "freely [give leave to amend] at any stage of

[14] WISCONSIN STAT. § 802.09(1) provides:

> **(1) Amendments.** A party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires. A party shall plead in response to an amended pleading within 45 days after service of the amended pleading, or within 20 days after the service if the proceeding is to foreclose or otherwise enforce a lien or security interest, unless (a) the court otherwise orders or (b) no responsive pleading is required or permitted under s. 802.01 (1).

the action when justice so requires," but it concluded that the equities did not favor Bindl. The court reasoned that Bindl had provided no explanation why the WIS. STAT. ch. 109 claim was not pleaded at an earlier time and the delay in seeking to amend the complaint was unnecessary and not explained by unexpected events that arose in the course of trial. Also, the court stated, granting permission to amend now would deprive Next Level of the opportunity to make a timely offer of settlement under WIS. STAT. § 807.01, which requires that, in order to have the benefits of that statute, the offer must be made at least twenty days before trial. The court reasoned that allowing an amendment at this time undermined the purpose of § 807.01, which is to avoid trials.

¶49 On appeal, Bindl argues that his complaint states a claim for recovery of wages as defined in WIS. STAT. § 109.01(3)[15] and requests reasonable attorney fees as one form of relief. According to Bindl, this is adequate notice under Wisconsin's notice pleading rule, even though he did not specifically refer to the statute. Bindl also argues that the public policy underlying WIS. STAT. § 109.03(6) requires that he be allowed attorney fees after prevailing on his claim that Next Level failed to pay him the salary and commission it owed him.

¶50 The first issue presented by Bindl's arguments is whether the complaint is sufficient to state a wage claim under WIS. STAT. ch. 109. The circuit court did not expressly rule on this issue, but it implicitly decided that the complaint was not sufficient. This issue presents a question of law, which we

[15] WISCONSIN STAT. § 109.01(3) provides:

> **(3)** "Wage" or "wages" mean remuneration payable to an employee for personal services, including salaries, commissions, … bonuses and any other similar advantages agreed upon between the employer and the employee or provided by the employer to the employees as an established policy.

review de novo. ***Wolnak v. Cardiovascular & Thoracic Surgeons of Central Wisconsin***, 2005 WI App 217, ¶47, ___ Wis. 2d ___, ___ N.W.2d ___.

¶51 ***Wolnak*** resolves the issue against Bindl. In ***Wolnak*** the jury returned a verdict in favor of the plaintiff on his claim that the defendant breached the contract by failing to pay him according to the contract. ***Id.***, ¶10. The plaintiff subsequently filed a motion to add penalties for wage claim violations in accordance with WIS. STAT. § 103.455 and WIS. STAT. ch. 109. ***Id.*** The circuit court denied the motion and we affirmed. After concluding that § 103.455 must be pleaded as a separate and distinct claim from a breach of contract claim, ¶51, we came to the same conclusion on a ch. 109 claim:

> Second, just as we concluded a WIS. STAT. § 103.455 claim must be pled with specificity, so too must a WIS. STAT. ch. 109 claim. Such a conclusion is even more strongly supported in this instance, because the chapter refers multiple times to a wage claim. Wolnak did not bring a wage claim, he brought a contract action. While the contract dealt with a dispute over compensation, WIS. STAT. § 109.03(5) establishes a distinct cause of action and enforcement procedure for a wage claim, wholly apart from any contract claims Wolnak might pursue. Additionally, we again have a situation where Wolnak seeks to have penalties assessed on a contract action. Thus, we conclude that merely pleading a contract action based on nonpayment of wages is insufficient to trigger a WIS. STAT. ch. 109 wage claim under notice pleading.

Wolnak, ¶57.

¶52 We also stated in ***Wolnak***:

> Finally, Wolnak was not the prevailing party as that term is used in WIS. STAT. § 109.03(6) or WIS. STAT. § 109.11. Wolnak argues he is the prevailing party because the jury found CATS breached the contract. But Wolnak ignores the plain language of the statutes. Both refer to the prevailing party in a *wage claim*. This was not a wage claim. The statutes do not apply, and Wolnak is not entitled to the penalty wages or costs.

Id., ¶59.

¶53 Bindl's argument on the public policy underlying WIS. STAT. ch. 109 in general and WIS. STAT. § 109.03(6) in particular is fully consistent with our holding in ***Wolnak***. We have held that the purpose of ch. 109 is to insure that employees receive their full wages when due, and we have construed the term "reasonable … expenses" in § 109.03(6) to include attorney fees because that effectuates these purposes. ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 400-01, 588 N.W.2d 67 (Ct. App. 1998). The policy of awarding prevailing employees for the expenses of recovering wrongfully withheld wages is furthered by requiring that the employee plead a ch. 109 claim as a claim separate and distinct from a breach of contract claim: this alerts the employer to the fact that, if the employee is successful, attorney fees are available under § 109.03(6) and it makes it more likely that the employer will not persist in a defense that lacks merit.

¶54 Bindl's complaint, like that in ***Wolnak***, pleaded a breach of contract claim but did not separately plead a wage claim under WIS. STAT. ch. 109. Accordingly, we conclude the circuit court's implicit decision that the complaint did not plead a wage claim under ch. 109 is correct.

¶55 Because Bindl's complaint did not plead a WIS. STAT. ch. 109 claim, attorney fees are available under WIS. STAT. § 109.03(6) only if the complaint is amended. A circuit court's decision whether to grant a party leave to amend its complaint is discretionary, and we affirm this decision if the court properly exercised its discretion. ***Hess v. Fernandez***, 2005 WI 19, ¶12, 278 Wis. 2d 283, 692 N.W.2d 655. A circuit court's exercise of discretion is proper when it "examine[s] the relevant facts, applie[s] a proper legal standard, and, using a

demonstrated rational process, reache[s] a reasonable conclusion." ***Id***. (citation omitted).

¶56 Bindl's public policy argument is not framed in terms of the court's exercise of discretion in denying permission to amend. However, we will construe his argument as contending that the circuit court erroneously exercised its discretion in denying permission to amend because of the important public policy underlying WIS. STAT. ch. 109. We reject this argument. The policies underlying ch. 109 apply to claims arising under that chapter. As we have already explained, ***Wolnak*** held that a ch. 109 claim is not a breach of contract claim and must be pleaded separately. The circuit court determined that Bindl had provided no explanation for not initially pleading a ch. 109 claim or for not seeking leave to amend sooner, and on appeal he does not supply any explanations. There is nothing in ch. 109 or the policies it expresses that requires a court to grant leave to add a ch. 109 claim in these circumstances.

B. Motion for Double Costs and 12% Statutory Interest under WIS. STAT. § 807.01

¶57 As noted above, at trial Bindl offered to settle with Next Level for "$41,999.00, plus plaintiff's taxable costs and reasonable attorney fees," and Next Level did not accept this offer. The jury awarded Bindl a total of $48,699.35 and we have affirmed the verdict. Bindl argued in a postverdict motion that he was entitled to double costs and 12% interest on the judgment under WIS. STAT. § 807.01(3) and (4) because he recovered a sum greater than that contained in his settlement offer. These sections provide:

> **(3)** After issue is joined but at least 20 days before trial, the plaintiff may serve upon the defendant a written offer of settlement for the sum, or property, or to the effect therein specified, with costs…. If the offer of settlement is not accepted and the plaintiff recovers a more favorable

> judgment, the plaintiff shall recover double the amount of the taxable costs.
>
> **(4)** If there is an offer of settlement by a party under this section which is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid. Interest under this section is in lieu of interest computed under ss. 814.04(4) and 815.05(8).

¶58 The circuit court denied Bindl's motion because it concluded that Bindl's settlement offer was not clear and unambiguous as required by ***Pachowitz v. LeDoux***, 2003 WI App 120, ¶39, 265 Wis. 2d 631, 666 N.W.2d 88. Specifically, the circuit court concluded that, because Bindl's complaint for breach of contract and promissory estoppel did not give Next Level notice that Bindl was entitled to attorney fees, his offer demanding reasonable attorney fees created an ambiguity.

¶59 Whether a litigant is entitled to double costs and 12% interest under WIS. STAT. § 807.01(3) and (4) is a question of law, which this court reviews de novo. ***Wilber v. Fuchs***, 158 Wis. 2d 158, 162, 461 N.W.2d 803 (Ct. App. 1990). The first step in the methodology for making this determination is to examine the offer to decide whether the offer "allow[s] the other party to fully and fairly evaluate the offer from his or her own independent perspective." ***Pachowitz***, 265 Wis. 2d 631, ¶43 (citation omitted). It is the obligation of the party making the offer to do so in clear and unambiguous terms, and any ambiguity is construed against the drafter. ***Id.***, ¶39.

¶60 Bindl argues on appeal as he did in the circuit court that his offer was clear and unambiguous because it informed Next Level of the specific amount he would accept for damages—$41,999—as well as the fact that attorney fees and

taxable costs were not included in that amount. He asserts that his failure to include an amount for attorney fees did not render his offer unclear because the court would determine that amount, should Next Level accept his offer, and he could not have included that amount because the court determines what is a reasonable amount of fees.[16]

¶61 We agree with the circuit court that Bindl's offer to settle for "$41,999, plus plaintiff's taxable costs and reasonable attorney fees" is not clear and unambiguous, although our analysis differs. Bindl's offer does not give Next Level a fair and full opportunity to evaluate the offer because the offer does not specify the amount Bindl was requesting for reasonable attorney fees and Next Level had no way of knowing what that amount was. *See* ***Mews v. Beaster***, 2005 WI App 53, ¶¶1, 11, 279 Wis. 2d 507, 694 N.W.2d 476 (an offer that does not allow a party to "know the value of 'X' from the language of the offer" is ambiguous). Our reasoning in ***Pachowitz*** also leads to this conclusion. There we held that when a defendant is sued on a claim that contains a fee-shifting provision, the defendant is on notice that the party is seeking not only damages but also attorney fees, and an offer is invalid if it fails to include an allowance for reasonable attorney fees. ***Pachowitz***, 265 Wis. 2d 631, ¶¶51-52. We characterized such an offer as "at best … a partial settlement offer," which WIS. STAT. § 807.01 does not contemplate. ***Id.***

[16] Bindl's argument is premised on his position that he is entitled to attorney fees under WIS. STAT. § 109.03(6), and, therefore, he will ultimately recover more than the offer: he has already recovered more in damages and he will recover the reasonable attorney fees the offer stated were in addition to $41,999. Next Level responds that Bindl did not and will not recover more than the offer because he is not entitled to reasonable attorney fees and the $50,795.35 he has recovered is substantially less than the offer of $41,999 plus reasonable attorney fees. This dispute implicates later steps in the methodology set forth in ***Pachowitz v. LeDoux***, 2003 WI App 120, ¶43, 265 Wis. 2d 631, 666 N.W.2d 88. We do not need to resolve this dispute because of our conclusion that the offer is insufficient under the first step.

¶62 In this case, unlike ***Pachowitz***, the plaintiff made the settlement offer. When the offer was made, Next Level, the defendant, was not on notice that Bindl was asserting a claim that contained a fee-shifting provision because the complaint contained no such claim and the complaint was not amended. However, even if Next Level knew that, Bindl's offer does not specify an amount of reasonable attorney fees, leaving that issue to the court to resolve. It is thus a partial settlement offer, which WIS. STAT. § 807.01 does not permit. ***Pachowitz***, 265 Wis. 2d 631, ¶¶51-52. The fact that a court decides the amount of fees when the parties dispute whether attorney fees are recoverable or the reasonableness of the amount is beside the point: nothing prevents Bindl from including in the offer the amount of fees that he will accept in settlement.

CONCLUSION

¶63 The circuit court did not err in denying Bindl's motion for attorney fees under WIS. STAT. § 109.03(6) or in denying his request for double costs and 12% interest under WIS. STAT. § 807.01. The circuit court did not erroneously exercise its discretion in allowing LaCoursiere to testify, and it correctly decided that there was sufficient evidence to support the jury's verdict. We therefore affirm on the appeal and the cross-appeal.

By the Court.—Judgment and order affirmed.

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