

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 14, 2010

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. 2009AP2344

Cir. Ct. No. 2008SC13023

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CINDY MENDEZ,

PLAINTIFF-CROSS-APPELLANT,

V.

KHAJA M. DIN AND KMD & ASSOCIATES, INC.,

DEFENDANTS-CROSS-RESPONDENTS.

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

¶1 HIGGINBOTHAM, J.¹ Cindy Mendez appeals a circuit court reduction of an award of attorney fees in a wage claim action against her former employer, Attorney Khaja M. Din. Mendez argues that the court erroneously exercised its discretion in reducing the fee award because (1) the record did not support the court's determination; (2) the court failed to conduct the proper legal analysis in calculating the award; and (3) the court failed to explain its rationale. We conclude that the circuit court erroneously exercised its discretion in calculating the attorney fee award by failing to determine the prevailing hourly rate for the legal service provided, in accordance with the lodestar approach set forth in *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶30, 275 Wis. 2d 1, 683 N.W.2d 58. In this case, the court was required to base its award on a determination of the prevailing hourly rate for supervised law student work on a wage claim. We therefore vacate that portion of the judgment setting the amount in attorney fees and remand this matter to the circuit court for a determination of reasonable attorney fees consistent with this opinion.

¶2 Cindy Mendez was employed by Attorney Khaja M. Din. Mendez filed an unpaid wage complaint with the Wisconsin Department of Workforce Development (DWD) alleging that Din failed to pay her for approximately 263 hours of work. After the DWD determined that Attorney Din owed Mendez wages, Mendez acquired the representation of the Neighborhood Law Project, a clinic at the University of Wisconsin Law School, and filed a small claims complaint with the Dane County Circuit Court.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-2008). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶3 Attorney Din failed to respond to the complaint and the court entered a default judgment against him. Attorney Din then failed to pay the judgment or file a financial disclosure statement as ordered by the court. Mendez filed a motion for contempt which was heard before Circuit Court Judge Shelly Gaylord. Judge Gaylord found Attorney Din in contempt and ordered him to complete a financial disclosure statement. Attorney Din filed a petition to reopen the case. After a hearing on the motion, Circuit Court Commissioner W. Scott McAndrew reopened the case and set a trial date.

¶4 Attorney Din failed to appear at trial. Mendez entered into evidence a document detailing her calculations for unpaid wages and attorney fees. With regard to attorney fees, the document listed a total of 28 hours spent on Mendez's case: approximately eighteen hours by one law student and approximately ten hours by another law student.² Mendez requested an hourly rate of \$175, which Mendez asserted to be the average fee charged by Madison attorneys in 2008. Commissioner McAndrew accepted her request and ordered a judgment of \$5000 in wages and \$4900 in attorney fees against Attorney Din.

¶5 After Attorney Din again failed to pay the judgment or file a financial disclosure statement, Mendez filed another motion for contempt. A hearing was set for July 24, 2009, and Attorney Din filed a motion to vacate the default judgment to be heard at the same time. At the July hearing, Circuit Court Judge Nicholas McNamara denied Attorney Din's motion to vacate, but reduced

² On appeal, Mendez asserts that the time spent by law students also involved work performed by their supervising attorney. Mendez's request for fees, however, only references hours spent by law students. It does not provide any information about hours spent by the supervising attorney.

the attorney fee award to \$1400. The court provided the following explanation for its decision:

I find that \$175 per hour for these attorney's fees is unreasonable. The State Public Defender's Office compensates appointed attorneys at a rate of \$40 an hour. I'm going to issue an order modifying the judgment that allows for a judgment of \$5,000 plus attorney's fees of \$1,400, which is 28 -- the 28 hours reported at \$50 per hour
....

¶6 WISCONSIN STAT. § 109.03(6) provides that a court may “allow the prevailing party, in addition to all other costs, a reasonable sum for expenses” in a wage claim action brought by an employee against an employer. We have interpreted this statute to authorize trial courts to award reasonable attorney fees in wage claim actions. *Jacobson v. American Tool Cos., Inc.*, 222 Wis. 2d 384, 401, 588 N.W.2d 67 (Ct. App. 1998).

¶7 A determination of attorney fees in a wage claim case is within the circuit court's discretion, and we will affirm this determination if the court considered the facts of record under the proper legal standard and reasoned its way to a rational conclusion. *Beaudette v. Eau Claire Cnty. Sheriff's Dep't*, 2003 WI App 153, ¶31, 265 Wis. 2d 744, 668 N.W.2d 133. The trial court may consider its own knowledge and experience, but its expertise is not a substitute for evidence when parties contest the reasonableness of attorney fees. *Peterson v. Gauger*, 148 Wis. 2d 231, 237, 434 N.W.2d 819 (Ct. App. 1988). A trial court erroneously exercises its discretion by simply “eyeballing” a fee request and reducing the amount without evidence to support the reduction. *Crawford Cnty. v. Masel*, 2000 WI App 172, ¶16, 238 Wis. 2d 380, 617 N.W.2d 188 (citing *People Who Care v. Rockford Bd. of Educ.*, 90 F.2d 1307, 1314 (7th Cir. 1996)).

¶8 The Wisconsin Supreme Court has adopted the “lodestar” approach as the legal standard for determining a reasonable attorney fee. *See Kolupar*, 275 Wis. 2d 1, ¶30. This analysis asks the trial court to first determine the number of hours reasonably expended on the case multiplied by a reasonable hourly rate. *Id.*, ¶28. This total provides the “lodestar,” which the court may then adjust to account for any remaining factors as provided in SCR 20:1.5(a).³ *Id.* ¶¶23-30.

¶9 In *Masel*, we held that the trial court erroneously exercised its discretion when it “eyeballed” attorney fees in a civil rights case. *Masel*, 238 Wis. 2d 380, ¶1. Plaintiff’s counsel submitted affidavits from himself and four other civil rights attorneys attesting to the reasonableness of an hourly rate of \$285 per hour for a civil rights attorney of his caliber. *Id.*, ¶¶10-11. The circuit court

³ The factors set forth in SCR 20:1.5(a) are:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

nonetheless reduced the award to \$175 per hour based on (1) an affidavit from a former City Attorney suggesting a rate of \$150-\$175 per hour and (2) the court's own belief that \$285 was unreasonable. *Id.*, ¶¶15-16. We held that the circuit court erred because (1) the City Attorney admitted that he did not know the current rate for civil rights lawyers and (2) the court failed to provide an explanation of why it found \$285 per hour to be an unreasonable rate.⁴ *Id.*

¶10 Based on our review of the circuit court's explanation of the fee award, we conclude that the court erroneously exercised its discretion by failing to employ the lodestar approach in calculating the attorney fee award. The circuit court's decision appears to rest solely on its belief that a \$175 hourly rate was unreasonable. Mendez requested a rate of \$175 per hour based on the average rate charged by attorneys in Madison as reported in a State Bar of Wisconsin survey; Din argued that this rate was excessive for work performed by law students. The circuit court referenced the \$40 per hour rate for private attorneys appointed to

⁴ The trial court in *Masel* provided the following explanation for its decision to reduce attorney fees:

I think one of the factors to be considered is that this type of constitutional issue often requires some special skill. Often the attorneys who practice these types of cases do have such special skills or area of expertise. Now, we're way over here in Podunk in the rural area and nobody over here charges anything near that. But, I realize that the standard of Crawford County is not the standard that I'm going by. That it's more of a statewide standard. However, I just [cannot] order \$285 an hour. It is not reasonable under all the circumstances here. I think that the maximum that should be awarded to Mr. Olson should be \$175 per hour, based in part at least on what Mr. Ritter [the City Attorney] says but also on the totality of what I've heard and just my own feeling that \$285 is not reasonable for this case.

Crawford Cnty. v. Masel, 2000 WI App 172, ¶13, 238 Wis. 2d 380, 617 N.W.2d 188.

State Public Defender (SPD) cases in its decision, but failed to explain why the awarded rate of \$50 per hour was appropriate for law student work performed on a wage claim case. Although the court began its discussion by referencing the hourly SPD rate, it appears to have “eyeballed” a total award—\$1400—and worked backwards by dividing that figure by the 28 hours worked on the file to arrive at a rate of \$50 per hour. As noted, a court may not within its discretion calculate an award by “eyeballing” a particular figure and dividing that amount by the hours worked to determine the hourly rate. Accordingly, we reverse the portion of the judgment relating to attorney fees, and remand for a recalculation of attorney fees using the lodestar approach.⁵

¶11 We note that neither party introduced affidavits or other submissions addressing the prevailing hourly rate for supervised law student work on a wage claim case. The trial court may, within its discretion, request additional affidavits and other submissions from the parties regarding the prevailing rate for supervised law student work in a wage claim action. We recognize that determining the rate in this case presents challenges because law students in clinical programs do not bill an hourly rate. Thus, it may be useful for the court to consider the prevailing rates for legal services provided by law students supervised by a licensed attorney. Regardless, a proper exercise of discretion in this case requires the court to consider the submissions of the parties relevant to the issue of the prevailing hourly rate for supervised law student work and to apply the lodestar method in determining the appropriate award of attorney fees.

⁵ Mendez also appears to argue that the court had no authority to consider Din’s objection to the attorney fees awarded by the small claims court commissioner. However, Mendez never fully develops this argument and therefore we do not consider it. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶12 Lastly, Mendez argues that the trial court should be allowed to award additional attorney fees for time spent litigating the fee issue on appeal. Din disagrees on the grounds that the Neighborhood Law Clinic performed the work *pro bono*. However, “[w]hen free legal services are provided there may be no direct barrier to the courtroom door, but if no fees are awarded, the burden of the costs is placed on the organization providing the services, and it correspondingly may decline to bring such suits.” *Shands v. Castrovinci*, 115 Wis.2d 352, 360, 340 N.W.2d 506 (1983) (quoting *Hairston v. R & R Apartments*, 510 F.2d 1090, 1092 (7th Cir. 1975)). This rationale applies equally to the appeals process. *See id.* at 359. We conclude, applying the rule in *Shands*, that an award of attorney fees is appropriate here because Mendez has substantially prevailed on this appeal. We ask the circuit court to take evidence and make findings regarding the reasonable attorney fees and costs incurred by Mendez in taking this appeal.

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.

