STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0166

Jana Karl, et al.,
Respondents,

vs.

Uptown Drink, LLC, et al.,
Appellants.

Filed August 6, 2012
Affirmed
Harten, Judge*

Hennepin County District Court
File No. 27-CV-10-1926

Steven A. Smith, Megan I. Brennan, Katherine M. Vander Pol, Nichols Kaster, PLLP, Minneapolis, Minnesota (for respondents)

J. Ashwin Madia, Madia Law LLC, Minneapolis, Minnesota (for appellants)

Considered and decided by Stauber, Presiding Judge; Chutich, Judge; and Harten, Judge.

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HARTEN, Judge

Appellants challenge the amount of attorney fees awarded in this class action to respondents following a jury verdict, arguing that the amount was excessive in light of the damages awarded to respondents. Respondents challenge the denial of their motion for partial judgment as a matter of law (JMOL) or a new trial on their unlawful deductions claim and the amount of the civil penalty imposed on appellants. Because we see no abuse of discretion in the attorney fee award, in the denial of respondents' motion for a new trial, or in the amount of the civil penalty, and no error in the denial of the motion for partial JMOL, we affirm.

FACTS

In 2010, respondents, a group of approximately 750 bartenders, servers, and security guards, brought this class action against appellants, their employers. Appellants are three bars, Uptown Drink, LLC (Uptown); Drink, Inc. (Drink); and Downtown Entertainment Ventures LLC d/b/a/ Spin Night Club (Spin); the bars' parent corporation, Fun Group, Inc., and its president, Michael Whitelaw.

Respondents alleged five counts pertaining to the period from 2008 to 2010: minimum wage violations, overtime violations, failure to maintain records, and unlawful deductions, all in violation of the Minnesota Fair Labor Standards Act (MFLSA) (Minn. Stat. §§ 177.2–.35 (2010)); and unlawful deductions in violation of the Payment of Wages Act (PWA) (Minn. Stat. §§ 181.01–.986) (2010)).

Just prior to the trial, respondents withdrew count 2, overtime violations. At the end of the trial, the district court granted respondents' motion for JMOL on the record-keeping violations claims at Uptown and Drink, but denied JMOL on the claim of unlawful deductions in violation of PWA.

The jury found that damages for minimum-wage violations at Uptown and Drink for bartenders and servers totaled $15,668.50: $5,211 for bartenders at Uptown; $3,340.50 for bartenders at Drink; $5,883 for servers at Uptown; and $1,234 for servers at Drink. Security guards had no damages because they were paid at least minimum wage, and no minimum-wage violations occurred at Spin. The jury also found that Spin failed to maintain records and that appellants did not make unlawful deductions from respondents' wages in violation of either MFLSA or PWA.

After trial, respondents sought $839,050 in attorney fees and $126,980.25 in costs. The district court added liquidated damages in the same amount as the damages found by the jury and awarded respondents minimum wage damages to servers of $11,766 against Uptown and $2,468 against Drink and to bartenders of $10,422 against Uptown and $6,681 against Drink, a total of $31,337. The district court also awarded respondents attorney fees of $559,367 and costs of $125,330.09. Finally, the district court imposed civil penalties for record-keeping violations under MFLSA of $13,674 against Uptown, $6,462 against Drink, and $14,521 against Spin, payable to the State of Minnesota. After

Uptown filed for bankruptcy, the district court issued an amended judgment removing all awards against Uptown ($22,188 in damages and $13,674 in civil penalties).[1]

Respondents' posttrial motion for partial JMOL or a new trial on their claim of unlawful deductions under PWA was denied. On appeal, they challenge this denial and the amount of the civil penalties; appellants challenge the award of attorney fees.[2]

D E C I S I O N

1. Attorney Fees

"We review the district court's award of attorney fees or costs for abuse of discretion." *Brickner v. One Land Dev. Co.*, 742 N.W.2d 706, 711 (Minn. App. 2007), *review denied* (Minn. Mar. 18, 2008).

"[T]he court shall order an employer who is found to have committed a violation or violations of sections 177.21 to 177.44 to pay to the employee or employees reasonable costs, disbursements, witness fees, and attorney fees." Minn. Stat. § 177.27, subd. 10. The district court found that "[t]he number and types of [appellant's] record-keeping violations were significant and hindered the jury from determining the specific amount of the minimum wage violations." Therefore, an award of "reasonable" attorney fees and costs was mandatory.

[1] Thus, the remaining damages award is $9,149 against Drink. Uptown is not a party to this appeal.

[2] Although appellants state the issue as whether the district court erred in its award of attorney fees and of costs, they do not present any argument challenging the award of costs and have therefore waived that issue. *See Melina v. Chapman*, 327 N.W.2d 19, 20 (Minn. 1982) (holding that issues not briefed on appeal are waived).

The jury awarded respondents $15,668.50. Their attorneys billed almost $840,000; the district court awarded two-thirds of that, or $559,367.[3] The parties dispute the amount of the reduced award.

The district court relied on *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608 (Minn. 2008). In *Milner*, also an MFLSA case, the district court first established the lodestar amount by multiplying the rate the attorneys had charged by the number of hours they submitted, less ten percent; it then multiplied the lodestar amount by 1.5 to arrive at an award of about $1.8 million. *Id.* at 620-21. This court concluded that the use of the multiplier was inappropriate and remanded for "an award of the lodestar without the multiplier." *Id.* at 620; *see Milner v. Farmers Ins. Exch.*, 725 N.W.2d 138, 146-47 (Minn. App. 2006). The supreme court agreed that a multiplier was inappropriate, *Milner*, 748 N.W.2d at 624-25, but reversed and remanded for recalculation of the lodestar amount because the district court determined that the hours expended, less ten percent, were reasonable, but "did not mention, let alone consider anywhere in its attorney fee analysis, the plaintiffs' complete failure to prove their claim for millions of dollars in unpaid overtime compensation." *Id.* at 622.

Milner set out the "[f]actors considered in determining reasonableness" of an attorney fee award: "the time and labor required; the nature and difficulty of the responsibility assumed; the amount involved and the results obtained; the fees customarily charged for similar legal services; the experience, reputation, and ability of

[3] The district court noted, "[N]o client would have agreed to pay nearly $840,000 for a jury award of less than $16,000."

counsel; and the fee arrangement existing between counsel and the client." *Id.* at 621 (quotation omitted). After considering these factors, *Milner* concluded that "[t]he court should focus on whether the hours expended are reasonable in relation to the overall relief obtained." *Id.* at 623; *see also Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S. Ct. 1933, 1943 (1983) (vacating attorney fee award and remanding for district court to award "plaintiff [who] achieved only limited success . . . only that amount of fees that is reasonable in relation to the results obtained"). Finally, *Milner* remanded for an award limited "to an amount that is reasonable in relation to the results obtained" and said that the district court could either identify specific hours to eliminate or "simply reduce the award to account for the limited success." *Milner*, 748 N.W.2d at 624 (quotations omitted).

The district court here followed *Milner* to arrive at a reasonable award. In applying the *Milner* factors, the district court found that: (1) the time and labor required were less than would have been required by less experienced firms; (2) the amount of labor required was increased by a number of factors outside respondents' control, including appellants' "obstruction to discovery attempts"; (3) there was nothing inherently difficult about the nature of the case, particularly in light of the firm's experience with MFLSA and class-action cases; (4) the fees the firm usually charged were either a one-third contingency fee, which would have resulted in an award of about $5,000, or a reasonable hourly rate; (5) assigning three attorneys to the case was unnecessary and "justifie[d] some reduction in the requested fee"; and (6) there was no fee structure with most of the clients because it was a class action.

The district court then quoted *Hensley* to conclude that "the 'results obtained' or 'degree of success' factor is 'particularly crucial' and even 'the most critical factor' for determining a reasonable attorney fee award." Finally, the district court noted that it would be impossible "to examine each line of the attorney bills for reasonableness" and took *Milner's* second option, simply reducing the award by one-third in light of the last-minute withdrawal of respondents' overtime claim, the failure of their unlawful deductions claims, and the small size of their award on the minimum wage claim, saying the reduced amount "balance[d] the over staffing of the case, failure to recognize its value, and the relatively minor level of success in the litigation, with the complications presented by [appellants'] actions and the delays not caused by [respondents]."

Milner rejected the view that the fee was justified because the employer had been "assessed a large civil penalty" and had begun to pay overtime. *Id.* at 623. Noting that, although neither of these acts resulted in any monetary relief for the plaintiffs, they were nevertheless indicative of some success, *Milner* concluded that "[t]he achievement of some success, however, does not necessarily support a significant attorney fees award. . . . A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Id.* (quotation omitted). The district court similarly rejected respondents' argument that appellants' changing of their record-keeping and payment practices justified the award of the entire amount of attorney fees.

Particularly in light of *Milner*, the district court did not abuse its discretion in setting the amount of the attorney-fee award.

2. Denial of Respondents' Motion for JMOL[4]

Respondents' motion for JMOL on their claim that appellants made unlawful deductions in violation of PWA was denied, and the issue went to the jury. The jury answered, "No" when asked if Drink, Spin, or Uptown made "unlawful deductions (for register shortages, unsigned credit card receipts and/or walk-outs) from [respondents] in violation of PWA?" Respondents then moved for partial JMOL or a new trial on the issue, alleging that the jury's verdict was manifestly contrary to the evidence and the law.

The district court denied respondents' motion for JMOL, having concluded that, because "[t]he deduction must result in the wages falling below minimum wage to violate the law" and

> [t]here was no evidence including testimony that any member of the class had his or her wages fall below minimum wage as a result of deductions from gratuities[,] . . . [a] reasonable jury could have concluded that even if the employees were forced to cover till shortages and unpaid customer tabs, those deductions were not unlawful as they did not reduce the wages below minimum wage.

This court will "apply de novo review to the district court's denial of a Rule 50 motion [for JMOL]." *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009). It will "view the evidence in the light most favorable to the prevailing party." *Id.* The

[4] Civil penalties imposed for unlawful deductions under MFLSA go to the state, while civil penalties imposed for unlawful deductions under PWA go to aggrieved employees. *See Milner*, 748 N.W.2d at 617-18 (interpreting MFLSA in light of PWA and holding that "under the PWA, penalties are paid to the individual employee," while "civil penalties are payable to the state under the MFLSA"). Respondents did not challenge the jury's finding that appellants made no unlawful deductions in violation of MFLSA in a posttrial motion, nor do they challenge it on appeal.

"prevailing party" on this issue was appellants, who were found by the jury not to have made unlawful deductions.

Respondents argue that the district court misstated the law when it denied their motion for partial JMOL because it "improperly held that in order for there to be a violation of the PWA, the deductions from wages must drop an employee below the minimum wage."[5]

"No employer shall make any deduction, directly or indirectly, from the wages due or earned by any employee . . . for lost or stolen property . . . unless the employee, after the loss has occurred . . . voluntarily authorizes the employer in writing to make the deduction . . . ." Minn. Stat. § 181.79, subd. 1(a). The district court interpreted the phrase "wages due or earned by any employee" to apply only to wages, not to gratuities, and concluded that, because no evidence indicated that deductions for losses had been taken from anything other than gratuities, the jury did not err in finding that appellants had not violated Minn. Stat. § 181.79, subd. 1(a).

[5] As a threshold matter, appellants argue that respondents may not challenge the denial of their motion for partial JMOL on the unlawful deductions in violation of PWA because that issue was not raised to the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). But, in their reply memorandum to appellants' memorandum in opposition to JMOL, respondents criticize appellants' "improper assumption that any amounts paid in for till shortages . . . were not unlawful deductions under either [MFLSA or PWA]"; state that "indirect deductions are also prohibited by both the MFLSA and the PWA"; quote Minn. Stat. § 181.79; and note, citing *Milner*, that MFLSA and PWA "should be interpreted in light of each other." Thus, respondents' position that appellants made unlawful deductions in violation of PWA was before the district court and may be argued on appeal.

Except for the term "employer" defined in Minn. Stat. § 181.171, subd. 4, the PWA provides no definitions of terms. Respondents claim that "wages" in Minn. Stat. § 181.79, subd. 1(a), should be interpreted to include gratuities. For this claim, they rely on a definition in the Equal Pay for Equal Work Law, Minn. Stat. §§ 181.66-.71 (EPEWL): "'Wages' means all compensation for performance or services by an employee for an employer whether paid by the employer or another person . . . ." Minn. Stat. § 181.66, subd. 4. But EPEWL specifically states that its definitions are "[f]or the purpose of sections 181.66 to 181.71." *Id.*, subd. 1. Thus, the legislature did not intend the EPEWL definition of wages to apply to Minn. Stat. § 181.79, subd. 1(a).

The legislature has provided that, absent a statutory definition, a statute's "words . . . are construed . . . according to their common and approved usage." Minn. Stat. § 645.08(1) (2010). The common meaning of "wages" does not include "gratuities." *See The American Heritage College Dictionary* 606, 1540 (4th ed. 2007) (defining "gratuity" as "[a] favor or gift, usu. of money, given in return for service" and "wage" as "[p]ayment for labor or services to a worker, esp. remuneration on an hourly, daily, or weekly basis or by the piece").

Moreover, PWA has been specifically invoked as "a related act that [also] covers employment and wages . . . and is referenced in the MFLSA." *Milner*, 748 N.W.2d at 617 (holding that "these acts . . . should be interpreted in light of each other" and

rejecting this court's use of the Minnesota Human Rights Act in construing MFLSA).[6] MFLSA defines "wage" as "compensation due to an employee by reason of employment" and "gratuities" as "monetary contributions received directly or indirectly by an employee from a guest, patron, or customer for services rendered." Minn. Stat. § 177.23, subds. 4, 9; *see also* Minn. Stat. § 177.27, subd. 8 (employer who pays less than wages and overtime to which employee is entitled is liable to employee for "the full amount of the wages, gratuities, and overtime").

In light of caselaw referring to MFLSA and PWA as "related acts," it is at least arguable that a rule pertaining to MFLSA applies equally to PWA. Minn. R. 5200.0090, subp. 1 (2011), pertains to MFLSA and provides that "[d]eductions from the minimum wage, whether direct or indirect, may not be made for shortages in money receipts . . . for cash shortages or losses resulting from . . . walkouts, bad checks . . . ." Since respondents failed to show that, as a result of appellants' practices, their wages ever fell below the

[6] *But see Brekke v. THM Biomedical, Inc*., 683 N.W.2d 771, 774-75 (Minn. 2004), an earlier case that addressed whether the accrued, unpaid salary of an employee who was also an officer, director, and shareholder was "wages" within the meaning of Minn. Stat. § 181.79, subd. 1. *Brekke* applied the "all compensation for performance or services by an employee for an employer" definition of "wages" in Minn. Stat. § 181.66, subd. 4, to conclude that Minn. Stat. § 181.79, subd. 1, applied. *Id.* at 775. *Milner* does not cite *Brekke,* which it implicitly overrules on the meaning of "wages" in Minn. Stat. § 181.79, subd. 1. Respondents rely on *Brekke* as an example of a case that found a violation of Minn. Stat. § 181.79, subd. 1, "without regard to whether the deduction at issue dropped the employee below the minimum wage," but *Brekke* is factually distinguishable: there is a significant difference between the financial circumstances of respondents, to whom the minimum wage was relevant, and the financial circumstances of the employee in *Brekke*, a physician and inventor of medical devices who was also connected to the employer as an officer, director, and shareholder and to whom the minimum wage was not relevant.

minimum wage, they present no evidence to show that any law was violated by appellants' deductions from their gratuities.

There was no error of law in the denial of JMOL on respondents' claim of unlawful deductions in violation of PWA.

3. Denial of Respondents' Motion for a New Trial

Respondents moved for a new trial on the ground that appellants' attorney's comments during closing argument misstated the law.

During closing argument, appellants' attorney said:

> Now, how about register shortages. Yeah, even some of our witnesses came in and said that happened on occasion, that they'd pay in for register shortages. . . .
>
> First, they said that they did it on their own volition. What they said was . . . we're talking 450, 500 bucks a night, if I've got to throw in six or seven dollars to cover a till shortage I would rather do that than take a write-up and if I get multiple write-ups lose my job. I love this job, I love working here, I take accountability for my till, this is common practice in the industry. If there's sixty bucks shortage and there's seven heads to divide it amongst so it's seven or eight bucks a person, I'm clearing 450 bucks, I'll throw in. No one made me throw in, no one came over and told me I'd be fired for not doing this.
>
> That's not a deduction. That's not a deduction at all . . . because that is someone on their own volition making a decision that rather than taking a write-up for improperly failing to handle cash, that they would rather throw in for that.
>
> . . . .
>
> [E]verybody here in this room, probably everybody in the state thinks employees ought to be paid for what they've worked. That's not the question here. The question is were

> they paid for the time they worked and how is this, what is the evidence that has been presented that they haven't. . . .
>
> [I]s that [evidence] the basis for a lawsuit? Should that be the basis to take down a business, to take down a drink [i.e., one of the appellants].[7]

Respondents did not object to these comments or ask for a curative instruction, but moved for a new trial because of the comments.

> An objection to improper remarks, a request for a curative instruction, and a refusal by the trial court to take corrective action are generally prerequisites to the obtaining of a new trial on appeal except where the misconduct is so flagrant as to require the court to act on its own motion, or is so extreme that a corrective instruction would not have alleviate[d] the prejudice.

Hake v. Soo Line Ry., 258 N.W.2d 576, 582 (Minn. 1977) (holding that, although counsel's reference to the death of the crew of the *Edmund Fitzgerald*, an ore ship that had sunk during the course of the trial, was improper and a curative instruction would have been appropriate, it was "not so extreme as to require a new trial").

The district court denied respondents' motion for a new trial, reasoning that:

> [A] party who fails to object waives its right to claim the statements warrant a new trial. . . . [Respondents argue] that they do not need to object if the conduct was so extreme that even a curative instruction would have been futile.
>
> Even assuming that a curative instruction would have been futile, an objection would have at least shortened the improper portions of [appellants'] closing and reduced the number of issues [respondents] now complain prejudiced them. The Court does not find that [appellants'] closing argument was so extremely flagrant in its misconduct or that

[7] Respondents' counsel did object to this last comment, but did not request a curative instruction.

> curative instructions would not have resolved the perceived issues.

Even when counsel's "inappropriate and inflammatory" comments are the basis for a motion for a new trial, an appellate court recognizes that "[t]he trial court judge . . . is present during the trial and is best positioned to determine whether or not an attorney's misconduct has prejudiced the jury." *Johnson v. Washington Cnty.*, 518 N.W.2d 594, 601 (Minn. 1994) (affirming this court's conclusion "that the trial court did not abuse its discretion in denying the . . . motion for a new trial based on attorney misconduct").

The district court did not abuse its discretion in denying respondents' motion for a new trial on the basis of appellants' counsel's comments.[8]

4. Amount of the Civil Penalty

The district court has the discretion to determine the amount of a civil penalty, and that decision will not be reversed absent an abuse of discretion. *Gillson v. State Dep't of Natural Res.*, 492 N.W.2d 835, 843 (Minn. App. 1992) (finding no abuse of discretion and affirming district court's assessment of civil penalty), *review denied* (Minn. Jan. 28, 1993).

"The commissioner may fine an employer up to $1,000 for each failure to maintain records as required by this section. . . . In determining the amount of a civil penalty under this subdivision, the appropriateness of such penalty to the size of the employer's business and the gravity of the violation shall be considered." Minn. Stat. § 177.30(b); *see also Milner*, 748 N.W.2d at 619 ("Civil penalties are fitting . . . for the

[8] Respondents also moved for a new trial on the basis of jury instructions, but on appeal they do not challenge the district court's denial of that motion.

recordkeeping violations. . . ."). "The legislature intended that the district court's powers mirror those of the Commissioner[.] . . . Accordingly, we conclude that employees may seek . . . civil penalties in actions brought in district court." *Id.* at 616 (citation omitted).

The district court determined that a penalty of $1 per edited shift record "puts the burden of the fine on each [appellant] in proportion to the number of violations committed by each and makes the total penalty in proportion to the damages recovered by the employees once [those damages are] liquidated." The district court's decision resulted in penalties of $6,462 against Drink, $13,674 against Uptown, and $14,521 against Spin. Thus, as a result of this lawsuit, respondents collectively received $31,337 in damages and the state received $34,657 in penalties.[9]

The parties and the district court note the absence of caselaw on setting the amounts of civil penalties. The district court noted that appellants were "large employers" as defined by Minn. Stat. § 177.24, subd. 1(a), which divides all employers into two categories depending on whether their annual gross volume of sales is more or less than $625,000, but also noted that appellants' size would not be comparable to that of a national restaurant chain.

Respondents argue that the $50 per shift penalty they suggested is a more appropriate penalty but, as the district court found, this would result in a penalty of

[9] The district court also noted that, while the statute does not require civil penalties to be proportionate to jury damages because the statute envisioned penalties being set by the Commissioner, not a district court, there is no statutory prohibition against considering the amount of damages found by a jury, and that "[i]t would be an absurd result for the State to reap significantly greater financial benefit than the [respondents] who were actually underpaid in this case."

$2,285,200 or, if only the edited shifts were considered, $1,732,850. The district court concluded that a penalty between $1,000,000 and $2,250,000 would be "disproportionate."

The district court had discretion to set what it saw as appropriate civil penalties, and it did not abuse that discretion; nor did it abuse its discretion in setting the attorney fee award or in denying respondents' motion for a new trial, and the denial of respondents' motion for partial JMOL was not an error of law.

Affirmed.