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IN THE
COURT OF APPEALS OF INDIANA

CARY R. WOLLENWEBER,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 32A01-1007-PL-318
	)	
HAWKINS ENTERPRISES, INC. d/b/a THE MATTRESS SUPERSTORE and SCOTT HAWKINS,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable David H. Coleman, Judge
Cause No. 32D02-0809-PL-40

June 17, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Cary R. Wollenweber appeals the trial court's ruling granting summary judgment in favor of Hawkins Enterprises, Inc. d/b/a The Mattress Superstore ("Hawkins Enterprises") and Scott Hawkins (together, the "Defendants"). Wollenweber raises seven issues, which we consolidate and restate as follows:

I. Whether the trial court erred in denying Wollenweber's motion for partial summary judgment; and

II. Whether the court erred in entering judgment in favor of the Defendants.

We affirm.

The relevant facts follow. Wollenweber was an employee of Hawkins Enterprises for ten days in June 2008, and Wollenweber's employment was terminated on June 25, 2008. Hawkins Enterprises attempted, through its payroll service, to make an electronic transfer or direct deposit of Wollenweber's net wages to his bank account on June 20, 2008 and July 5, 2008, but the deposits were unsuccessful. After Wollenweber's attorney contacted Hawkins Enterprises, the company paid $950 in gross wages to Wollenweber on August 20, 2008.

Wollenweber filed a complaint on September 11, 2008 and an amended complaint on December 24, 2008, alleging that the Defendants violated the Wage Payment Statute, the Wage Claims Statute, and the Fair Labor Standards Act (the "FLSA"). Scott Hawkins filed a motion for partial summary judgment with respect to Wollenweber's claims against him individually under the Wage Claims Statute and the Wage Payment Statute, which the trial court granted.[1]

[1] Hawkins did not request summary judgment under the FLSA.

In December 2009, Wollenweber filed a motion for partial summary judgment, designated materials, which included a letter Wollenweber's counsel had received from the Indiana Attorney General stating that he was authorized to represent Wollenweber in connection with Wollenweber' claim under the Wage Claims Statute, and a memorandum of law in support of the motion. The Defendants filed a response to Wollenweber's motion together with designated materials, and Wollenweber filed a reply. The Defendants also filed a motion to strike the Attorney General's letter as inadmissible material. On January 26, 2010, the court denied Wollenweber's motion for partial summary judgment.

Following a bench trial, at which the parties submitted stipulated facts and presented evidence, the court took the matter under advisement and entered judgment in favor of the Defendants on March 18, 2010. The court's judgment stated:

> The court finds that the defendants did comply with federal and state law by attempting to make direct deposits into the plaintiff's checking account on June 19 and July 2, 2008. For some unknown reason, the deposits were returned electronically to the defendant's bank account. The defendant did not get a notice or call from the bank until the end of the month when bank statements were mailed. This was not discovered by the defendant until notified by plaintiff's counsel a few weeks later. Upon notice, the defendant forwarded a check to the plaintiff on August 20, 2008 for full payment of all wages due to the plaintiff.
>
> Accordingly, the court denies the plaintiff's Complaint and enters judgment for the defendants.

Appellant's Appendix at 23-24. Wollenweber filed a motion to correct errors, which the court denied.

On appeal, Wollenweber argues that the court erred in denying his motion for partial summary judgment and in entering judgment following trial in favor of the Defendants. We address each issue separately below.

As an initial matter, we note that Wollenweber presented arguments in his summary judgment motion and at trial related to Ind. Code § 22-2-5, commonly referred to as the Wage Payment Statute, and Ind. Code § 22-2-9, commonly referred to as the Wage Claims Statute. Ind. Code § 22-2-5-1 of the Wage Payment Statute provides that "[e]very person, firm, corporation, limited liability company, or association . . . doing business in Indiana, shall pay each employee at least semimonthly or biweekly, if requested, the amount due the employee," and Ind. Code § 22-2-5-2 provides for the recovery of liquidated damages, costs, and reasonable attorney fees where an employer fails to make payments as required by Ind. Code § 22-2-5-1.[2]

The Wage Claims Statute also concerns disputes over the amount of wages due and provides for the recovery of liquidated damages and attorney fees. See St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele, 766 N.E.2d 699, 704-705 (Ind. 2002). According to Ind. Code § 22-2-9-2(a), "[w]henever any employer separates any employee from the pay-roll, the unpaid wages or compensation of such employee shall

[2] Ind. Code § 22-2-5-2 provides in part:

> Every such person, firm, corporation, limited liability company, or association who shall fail to make payment of wages to any such employee as provided in section 1 of this chapter shall, as liquidated damages for such failure, pay to such employee for each day that the amount due to him remains unpaid ten percent (10%) of the amount due to him in addition thereto, not exceeding double the amount of wages due, and said damages may be recovered in any court having jurisdiction of a suit to recover the amount due to such employee, and in any suit so brought to recover said wages or the liquidated damages for nonpayment thereof, or both, the court shall tax and assess as costs in said case a reasonable fee for the plaintiff's attorney or attorneys.

become due and payable at regular pay day for pay period in which separation occurred . . . ." In Steele, the Court explained: "Claimants who proceed under this statute may not file a complaint with the trial court. Rather, the wage claim is submitted to the Indiana Department of Labor." Steele, 766 N.E.2d at 705.

> It then becomes "the duty of the commissioner of labor to enforce and to insure compliance with the provisions of this chapter, to investigate any violations of any of the provisions of this chapter, and to institute or cause to be instituted actions for penalties and forfeitures provided under this chapter." I.C. § 22-2-9-4(a). . . . Further, the commissioner may take assignments of wage claims under $800[3] and refer wage claims to the Attorney General, who may then initiate a civil action on behalf of the wage claimant or refer the wage claim to a private attorney. I.C. §§ 22-2-9-4(b), -5. Claimants whose lawsuits have been initiated by the Attorney General or the Attorney General's designee are entitled to recover liquidated damages and attorney fees as set forth in Indiana Code section 22-2-5-2. I.C. § 22-2-9-4(b).

Id.

In addition, the Wage Claims Statute expressly provides that "[t]he provisions of IC 22-2-5-2 apply to civil actions initiated under this subsection by the attorney general or his designee." See I.C. § 22-2-9-4(b) (explicitly listing I.C. § 22-2-5-2); Reel v. Clarian Health Partners, Inc., 917 N.E.2d 714, 721 (Ind. Ct. App. 2009) (noting that Ind. Code § 22-2-9-4(b) provides for penalties and attorney fees as detailed in Ind. Code § 22-2-5-2 in connection with civil actions instituted by the Attorney General or his designee under the Wage Claims Statute), reh'g denied, trans. denied.

The Indiana Supreme Court has found that "[a]lthough both the Wage Claims Statute and the Wage Payment Statute set forth two different procedural frameworks for

[3] The current version of Ind. Code § 22-2-9-5, applicable in this case, references "claims of less than six thousand dollars."

wage disputes, each statute applies to different categories of claimants." Steele, 766 N.E.2d at 705. The Wage Claims Statute references employees who have been separated from work by their employer, and employees whose work has been suspended as a result of an industrial dispute. Id. (citing Ind. Code § 22-2-9-2(a), (b)). By contrast, the Wage Payment Statute references current employees and those who have voluntarily left employment, either permanently or temporarily. Id. (citing Ind. Code § 22-2-5-1(b)).

In this case, Wollenweber's employment at Hawkins Enterprises was terminated on June 25, 2008. Wollenweber filed a claim with the Indiana Department of Labor in late July 2008 and his initial complaint with the trial court on September 11, 2008. Under Steele, it was proper for Wollenweber to pursue his claim under the Wage Claims Statute.[4] See Steele, 766 N.E.2d at 705 (finding that because Dr. Steele was a current employee of St. Vincent at the time of the wage dispute, he proceeded correctly under the Wage Payment Statute).

We also note that Wollenweber presented arguments in his summary judgment motion and at trial that the payment of his wages were untimely under the FLSA. The FLSA requires that an employer pay each employee a minimum wage set by the Act. 29

[4] Wollenweber also asserts that he "filed a claim with the Indiana Department of Labor in late July 2008 after not receiving any response" from the Defendants and that the claim "was referred to counsel for [Wollenweber] by the Attorney General's Office in conjunction with the Department of Labor via an October 3, 2008 letter." Appellant's Brief at 4 (citations omitted). The Defendants state that Wollenweber had moved to introduce the October 3, 2008 letter at trial but that, after Hawkins Enterprises objected, the court did not admit the letter. We note, however, that the Defendants do not point to the record to show that they presented an argument below that Wollenweber failed to follow the procedure under Ind. Code § 22-2-9 for private counsel to pursue a claim against an employer under the Wage Claims Statute. We decline to address this procedural issue for the first time on appeal.

We also observe that the outcome of this case does not turn on whether Wollenweber's wage claim is governed by the Wage Payment Statute or the Wage Claims Statute. As stated above, the Wage Claims Statute expressly incorporates the penalty provisions of the Wage Payment Statute, see Ind. Code § 22-2-9-4(b), and the Defendants have not shown that Wollenweber failed to follow the applicable procedures to bring his claim under either set of statutory provisions.

U.S.C. § 206. Section 206(b) mandates that "every employer shall pay" employees the minimum wage if "in any workweek [the employee] is engaged in commerce."

I.

The first issue is whether the trial court erred in denying Wollenweber's motion for partial summary judgment. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Mangold ex rel. Mangold v. Ind. Dep't of Natural Res., 756 N.E.2d 970, 973 (Ind. 2001)). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmovant. Mangold, 756 N.E.2d at 973. Our review of a summary judgment motion is limited to those materials designated to the trial court. Id. We must carefully review a decision on summary judgment to ensure that a party was not improperly denied his day in court. Id. A party moving for summary judgment bears the initial burden of showing no genuine issue of material fact and the appropriateness of judgment as a matter of law. Id. (citing Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 975 (Ind. 2005)). If the movant fails to make this *prima facie* showing, then summary judgment is precluded regardless of whether the non-movant designates facts and evidence in response to the movant's motion. Id.

In his motion, Wollenweber requested partial summary judgment against Hawkins Enterprises in the amount of $1,900 in liquidated damages and against Scott Hawkins for liability pursuant to the FLSA. In support of the motion, Wollenweber designated evidence which included his affidavit and responses to interrogatories and admissions. In his memorandum in support of the motion, Wollenweber indicated that the parties did not

agree as to the wages owed to him for the work he performed but argued that there was no genuine issue of material fact that he was not paid in a timely fashion as required by the Wage Payment Statute, the Wage Claims Statute, or the FLSA.

In its response, Hawkins Enterprises argued that it attempted payment of Wollenweber's wages in June and July 2008, that Wollenweber did not provide correct information for ACH payment, that Wollenweber did not contact it regarding any unpaid wages until August 2008, and that it immediately paid Wollenweber upon learning that he had not received his wages. Hawkins Enterprises designated the affidavit of Scott Hawkins and certain responses of Wollenweber to requests for admissions and interrogatories. Hawkins's affidavit stated in part that Hawkins Enterprises "sent payments for Wollenweber's net pay via ACH" on the June 20, 2008 and July 5, 2008 pay dates and that "Wollenweber did not provide [Hawkins Enterprises] with sufficient and correct bank account information to effect ACH payment of Wollenweber's pay." Appellant's Appendix at 41. In his reply, Wollenweber argued that Hawkins Enterprises's assertion that he did not give it correct information for ACH payment was Hawkins's opinion and not a fact.

On appeal, Wollenweber's argument with respect to his motion for partial summary judgment focuses on Hawkins's statement in his affidavit that "Wollenweber did not provide [Hawkins Enterprises] with sufficient and correct bank account information to effect ACH payment of Wollenweber's pay." Appellant's Brief at 10 (footnote omitted). Wollenweber argues that this statement was Hawkins's opinion and not a fact. Wollenweber further argues that Hawkins Enterprises failed "to provide any

evidence to support the assertion that [he] was untimely paid due to the fault of [] Wollenweber" and thus that the court "erred in failing to enter summary judgment as to the liability of [Hawkins Enterprises] for the late wage payments made to [] Wollenweber." Id. Wollenweber also argues that the court failed to enter summary judgment with respect to liability under the FLSA.

The Defendants argue that Hawkins's affidavit containing the statement challenged by Wollenweber was included in the designated materials. The Defendants argue that the designated materials "construed in the light most favorable to [Hawkins Enterprises] establish . . . that [it] submitted payment of Wollenweber's wages on the appropriate dates to his bank account by electronic transfer," that "[f]or some unknown reason, the electronic deposits were returned," and that "a logical inference from these facts is that Wollenweber failed to provide . . . the correct accounting information or routing number to enable an electronic transfer." Appellees' Brief at 11. The Defendants assert that "[i]t would be illogical to construe the statute as not requiring the employee to supply sufficient information to enable an electronic transfer and to hold the employer liable for the employee's failure to do so." Id. at 12. The Defendants argue that the designated materials show that it "timely made payments in the proper amounts and on the proper dates to Wollenweber's account," that it "complied with the strict language of the statute by making electronic transfers," and that "at minimum there were genuine issues of fact whether Wollenweber was timely paid, whether he submitted sufficient information to complete an electronic transfer, and whether [Hawkins Enterprises] made payment to his account on the appropriate date." Id. at 12-13. In his reply brief,

Wollenweber argues that Hawkins Enterprises has provided no evidence that he provided incorrect account information.

Here, the designated evidence shows that Hawkins Enterprises paid its employees through electronic transfer and utilized a payroll service that worked with Hawkins Enterprises's bank. The designated evidence, which includes paystub detail for Wollenweber and bank account statements for Hawkins's Enterprises, shows a withdrawal from Hawkins Enterprises's account on June 19, 2008 in the amount of Wollenweber's net pay for June 20, 2008 and a withdrawal on July 2, 2008 in the amount of Wollenweber's net pay for July 5, 2008. The designated evidence further shows that the amount withdrawn from the account of Hawkins Enterprises on June 19, 2008 was credited back on June 26, 2008, and the amount withdrawn on July 2, 2008 was credited back on July 10, 2008. Hawkins Enterprises received its bank statement for the month of July 2008 in August 2008. Moreover, Hawkins stated in his affidavit that Wollenweber did not provide Hawkins Enterprises with sufficient and correct bank account information to effect ACH payments of Wollenweber's pay. Based upon the designated materials, we cannot say that there existed no genuine issue of material fact and find that the court did not err in denying Wollenweber's motion for partial summary judgment.

II.

The next issue is whether the court erred in entering judgment in favor of the Defendants.[5] General judgments are presumed to be premised upon findings which are supported by the evidence, and provided the decision of the trial court can be sustained upon any legal theory, we must affirm. City of Logansport v. Remley, 453 N.E.2d 326, 328 (Ind. Ct. App. 1983). In reviewing the record to determine whether the trial court's decision was proper, we will neither reweigh the evidence nor judge the credibility of witnesses. Id. Instead, we consider only that evidence, together with all reasonable inferences drawn therefrom, which favor the judgment, and if from this perspective there is evidence of probative value which supports the judgment, we will not disturb it. Id.

Wollenweber argues that the court erred in failing to enter judgment against the Defendants. Wollenweber argues that he is entitled to statutory damages of $1,900 pursuant to the Wage Payment Statute and Wage Claims Statute and that Hawkins violated the FLSA by failing to pay him at least his minimum wages on the June 20, 2008 and July 5, 2008 pay dates. Wollenweber argues that the court's judgment is erroneous because the court "found that [the Defendants] had not paid [him] on the agreed upon pay dates" but "found that [the Defendants] were not liable for the untimely payment." Appellant's Brief at 16. Wollenweber further argues that the court "correctly concluded

[5] Wollenweber also argues that the trial court erred in failing to address all of the factual and legal issues and requests remand for a new trial so that the trial court can address each of the outstanding issues. To the extent Wollenweber is arguing that the court erred in not entering findings of fact and conclusions thereon, Wollenweber does not argue or point to the record to show that he timely requested findings pursuant to Ind. Trial Rule 52, and we cannot say that the trial court erred. See Ind. Trial Rule 52(A) ("Upon its own motion, or the written request of any party filed with the court prior to the admission of evidence, the court in all actions tried upon the facts without a jury . . . shall find the facts specially and state its conclusions thereon."); Palm v. Palm, 690 N.E.2d 364, 367-368 (Ind. Ct. App. 1998) (holding that the trial court did not err in failing to enter special findings of fact and conclusions of law where findings were not timely requested under Ind. Trial Rule 52), trans. denied.

that [the Defendants] would have had notice that [he] had not been paid via direct deposit upon receipt of [Hawkins Enterprises's] monthly bank statement sent to [Hawkins Enterprises] at the end of the month," that the court "failed to find [the Defendants] were liable for failing to pay [him] in a timely fashion from this date of notice," and that the court "erroneously found that as a matter of law [the Defendants] were not required to rectify the failure to pay wages until given actual notice of the issue." Id.

The Defendants argue that the judgment is well supported by the evidence, that "[i]n order for either Hawkins or [Hawkins Enterprises] to be liable for the late payment of minimum wages, Wollenweber must first establish that he was not paid his minimum wages," that "[h]e has failed to establish that his wages were not paid," and that the "evidence before the trial court was Wollenweber admitted he had been paid more than he was owed." Appellees' Brief at 20. In his reply brief, Wollenweber argues that Hawkins Enterprises had at least constructive notice that he had not been paid on June 20, 2008 upon receipt of its June 2008 bank statement by early July 2008 and that "[u]nder no circumstances should an employer be permitted to remain ignorant of its accounting and/or payroll documentation in its possession to defend its failure to identify and rectify such an issue." Appellant's Reply Brief at 11.

The stipulated facts submitted at trial indicate that Wollenweber was an employee of Hawkins Enterprises and that Hawkins Enterprises paid $950 in gross wages to Wollenweber on August 20, 2008. The parties further stipulated that Wollenweber worked for Hawkins Enterprises for ten days between June 14, 2008 and June 25, 2008. The pay date for the pay period ending June 15, 2008 was June 20, 2008, and the pay

date for the pay period ending June 30, 2008 was July 5, 2008. The parties stipulated that Wollenweber was to be paid by direct deposit.

Scott Hawkins testified at trial to the same facts asserted in his affidavit and that he did not understand that Wollenweber had not received payments on June 20, 2008 and July 5, 2008 until Wollenweber's attorney contacted him, at which time he made sure Wollenweber was paid. On cross-examination, when asked what information he sought from Wollenweber in order to set up direct deposit, Hawkins testified: "[W]e asked for his name, address, it's a basic screen that comes up and asks . . . his name and his address. Then it will save your account number and then it will ask for a routing number and as they tell me, I just type it in and it'll come up if it's a bank, it'll come up and actually tell me the bank and it came up I believe First National if I remember." Transcript at 59. Hawkins also indicated that "there is no form to be filled out," that "[i]t doesn't generate one, never has," and that he did not ask employees or Wollenweber for a deposit slip. Id. at 59. When asked if he entered the information Wollenweber gave him incorrectly, Hawkins testified "I guess it's possible but it still brought up First National." Id. at 60.

The parties disputed the pay amount Wollenweber was to receive as well as the actual dates worked. In entering judgment for the Defendants, the trial court implicitly determined that $950 was the correct amount owed Wollenweber in gross wages. The evidence shows that payment of Wollenweber's wages was submitted on the appropriate dates by electronic transfer. For some reason, the electronic deposits were subsequently

returned by the bank. There is support in the record for the court's judgment. We will not reweigh the evidence on appeal. See City of Logansport, 453 N.E.2d at 328.

Based upon the evidence presented at trial, we conclude that the trial court did not err in entering judgment in favor of the Defendants. See id. at 328-329 (noting that the judgment contained no special findings and the evidence presented regarding the amount of compensatory time wages was contradictory, and holding that the evidence supported the court's judgment determination).

For the foregoing reasons, we affirm the trial court's denial of Wollenweber's motion for partial summary judgment and the court's judgment in favor of the Defendants.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.