

Case Summary

Johnny L. Miller appeals the small claims court's judgment in favor of Karesh Enterprises, Inc., d/b/a Fitness Together ("Fitness Together") on his complaint alleging that Fitness Together wrongfully withheld wages in violation of the Indiana Wage Payment Statute and seeking liquidated damages and attorney's fees. We affirm.

Issue

Miller raises two issues, which we consolidate and restate as whether the small claims court's judgment in favor of Fitness Together was clearly erroneous.

Facts and Procedural History

The evidence in support of the judgment indicates that on January 27, 2006, John Karesh ("Karesh"), owner of Fitness Together, hired Miller as a personal trainer. Fitness Together paid their employees on the 1st and 16th of each month, and the employees received their paychecks on the premises of Fitness Together. Tr. at 25-26. Accordingly, Miller picked up all his paychecks at Fitness Together. *Id.* at 13. Fitness Together did not mail Miller's paychecks to him.

On May 24, 2006, Karesh and Miller were at Fitness Together. Karesh had discovered that Miller's non-compete agreement was missing from his personnel file. *Id.* at 23. Karesh asked Miller to sign another non-compete agreement and to complete a new W-2 form. Miller completed the W-2 form but did not sign the non-compete agreement. Later that day, Karesh telephoned Miller. They discussed Miller's failure to sign the non-compete form, and Miller voluntarily terminated his employment effective immediately.

On June 1, 2006, Miller's next scheduled payday, Fitness Together issued his paycheck. *Id.* at 25. Karesh put the check in an envelope with Miller's name on it. *Id.* at 26. He expected Miller to come in and pick up the check. *Id.* Miller did not do so.

On June 22, 2006, Miller filed a small claims complaint against Fitness Together alleging the following:

[Miller] has earned and is due and owing wages in the principle amount of \$795.00 from [Fitness Together]. Said wages were scheduled to be paid on [June 1, 2006]. [Fitness Together] failed to make said wage payment on [June 1, 2006]. On [June 7, 2006] [Miller] contacted [Fitness Together] and made a demand for said wages. [Fitness Together] refuses to pay said wages to [Miller][.] [Fitness Together] is in violation of Indiana's Wage Payment Statute, Ind. Code § 22-2-5 *et seq.*

Appellant's App. at 54. On July 13, 2006, Fitness Together's attorney forwarded the paycheck to Miller, dated June 1, 2006, in the amount of \$620.07.¹

On January 9, 2007, following a hearing, the small claims court issued its judgment, which provides,

The Court now finds [Miller] did voluntarily terminate his employment with [Fitness Together] on or about May 24, 2006. The Court further finds that, as required by statute, [Fitness Together] prepared [Miller's] final paycheck on or about June 1, 2006, in the normal course of business. The linchpin of [Miller's] claim is whether [Fitness Together] unlawfully held [Miller's] paycheck or refused delivery of the paycheck until the paycheck was delivered to [Miller] during the course of pre-trial negotiations between the parties on or about July 13, 2006. [Miller] testified that he believed he was barred from entering the premises of [Fitness Together] and requested that his paycheck be mailed to him. John Karesh testified that no requests were made prior to the filing of a lawsuit and that [Miller] was in no way restrained from coming on to the premises and retrieving his paycheck. [Miller] has the burden of proof in this regard and the Court cannot find that [Miller] has sustained his burden.

¹ The record before us does not explain the discrepancy between the amount of this check and the amount that Miller claimed was due him. However, Miller does not contest the amount of the check.

Therefore, the Court enters judgment in favor of [Fitness Together] and against [Miller] on his Complaint.

Id. at 3. Miller appeals.

Discussion and Decision

Miller challenges the small claims court's judgment in favor of Fitness Together. Our standard of review is well settled:

Judgments in small claims actions are “subject to review as prescribed by relevant Indiana rules and statutes.” Ind. Small Claims Rule 11(A). When reviewing claims tried by the bench without a jury, we shall not set aside the judgment “unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Ind. Trial Rule 52(A). In determining whether a judgment is clearly erroneous, we do not reweigh the evidence or determine the credibility of witnesses. Rather, we consider only the evidence that supports the judgment and the reasonable inferences to be drawn therefrom.

Wehry v. Daniels, 784 N.E.2d 532, 534 (Ind. Ct. App. 2003) (some citations omitted). The deferential standard for the review of facts “is particularly important in small claims actions, where trials are ‘informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law.’ ” *City of Dunkirk Water & Sewage Dep't v. Hall*, 657 N.E.2d 115, 116 (Ind. 1995) (quoting Ind. Small Claims Rule 8(A)). However, this deferential standard is not applied to substantive rules of law, which are reviewed de novo. *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1067 (Ind. 2006).

Miller sought liquidated damages and attorney's fees based on Fitness Together's alleged violation of the Indiana Wage Payment Statute. Specifically, Miller claims that Fitness Together violated Indiana Code Section 22-2-5-1, which provides in relevant part that “if an employee voluntarily leaves employment, either permanently or temporarily, the

employer shall not be required to pay the employee an amount due the employee until the next usual and regular day for payment of wages, as established by the employer.” Simply stated, “Employees, upon separation from employment, must be paid the amount due them at their next and usual payday.” *Fardy v. Physicians Health Rehab. Serv., Inc.*, 529 N.E.2d 879, 882 (Ind. Ct. App. 1988). Additionally, we have determined that a demand for unpaid wages is not required by this portion of the statute. *Id.*; see also *Osler Inst., Inc. v. Inglert*, 558 N.E.2d 901, 905 (Ind. Ct. App. 1990) (“To hold otherwise would allow employers owing wages to their employees to terminate the employees, avoid the payment of wages, and then be shielded from the application of the penalty statute.”), *aff’d* by 569 N.E.2d 636 (Ind. 1991). A violation of Indiana Code Section 22-2-5-1 triggers the punitive sanctions of Indiana Code Section 22-2-5-2. *Fardy*, 529 N.E.2d at 882. Section 22-2-5-2 provides in pertinent part that, in the event the employer fails to pay the employee the amount due to the employee at his or her next and usual payday, the employee may recover liquidated damages and reasonable attorney’s fees.

Miller first asserts that “[t]he trial court erred when it ruled that Fitness Together satisfied and complied with Indiana’s Wage Payment Statute’[s] ‘payment’ of wages when it prepared [Miller’s] final paycheck on or about June 1, 2006, in the normal course of business”, because “Fitness Together did not pay Miller his final wage payment until it transferred possession of the paycheck to Miller approximately one and a half months after Miller voluntarily terminated his employment relationship with Fitness Together.” Appellant’s Br. at 6 and 7. However, Miller did not argue to the small claims court that Indiana Code Section 22-2-5-1 requires employers to “deliver” the final paycheck to the

employee. Rather, Miller argued that he believed that he was not permitted to return to Fitness Together to pick up his paycheck and that Fitness Together refused to mail him his paycheck after he called and left a message requesting that his final paycheck be mailed to him. Tr. at 7-8, 13. It is well established that a party may not change its theory on appeal and argue an issue that was not properly presented to the trial court. *Stainbrook v. Low*, 842 N.E.2d 386, 396 (Ind. Ct. App. 2006), *trans. denied*; *see also Mid-States Gen. & Mech. Contracting Corp. v. Town of Goodland*, 811 N.E.2d 425, 436 n.2 (Ind. App. 2004) (“An appellant who presents an issue for the first time on appeal waives the issue for purposes of appellate review.”). Accordingly, we conclude that Miller has waived this argument.

Next, Miller contends that “the trial court held that I.C. § 22-2-5-1 requires that an employee demand unpaid wages in order to invoke I.C. § 22-2-5-2.” Appellant’s Br. at 8. We disagree with Miller’s characterization of the small claims court’s holding. The judgment states,

[Miller] testified that he believed he was barred from entering the premises of [Fitness Together] and requested that his paycheck be mailed to him. John Karesh testified that no requests were made prior to the filing of a lawsuit and that [Miller] was in no way restrained from coming on to the premises and retrieving his paycheck. [Miller] has the burden of proof in this regard and the Court cannot find that [Miller] has sustained his burden.

Appellant’s App. at 3. The small claims court did not find that Miller was required to “demand” his unpaid wages in order to trigger Indiana Code Section 22-2-5-2. Rather, the issue before the small claims court was whether Fitness Together had refused to pay Miller. As such, it was a *factual* issue to be determined by the trial court, and Miller has not argued that the evidence was insufficient to support the small claims court’s finding. We find no

error here. Accordingly, we conclude that the small claims court's judgment in favor of Fitness Together was not clearly erroneous.

Affirmed.

DARDEN, J., and MAY, J., concur.