STATE OF MICHIGAN

COURT OF APPEALS

CORY HARRIS, BRADLEY MCCARTHY, and COREY CUTLER,

Plaintiffs-Appellants,

v

DEBT SETTLMENT OF AMERICA, LLC, and ERB AVORE,

Defendants-Appellees.

UNPUBLISHED
December 10, 2009

No. 287824
Kent Circuit Court
LC No. 07-11366-CZ

Before: Markey, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Plaintiffs appeal by right the judgment entered in their favor against defendant Debt Settlement of America, LLC (DSA), after default was entered against both defendants. Plaintiffs sought actual and "liquidated" damages under the Fair Labor Standards Act (FLSA), 29 USC 201 *et seq*., claiming that their paper paychecks were habitually delivered up to five days after other employees received their pay by electronic deposit for the same work period. Each plaintiff also claimed he was not compensated for two hours of mandatory training.[1] The trial court denied defendants motion to set aside default, conducted hearings on damages, and rather than award "liquidated" damages under 29 USC 216(b), exercised the discretion granted by 29 USC 260 to award plaintiffs only interest on each "late" paycheck plus an attorney fee of $3,000. We affirm but remand for modification of the judgment consistent with this opinion.

The trial court granted summary disposition to defendant Erb Avore under MCR 2.116(C)(10). We review de novo a trial court's decision to grant a party summary disposition to determine whether the party is entitled to judgment as a matter of law. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A party's claim to summary disposition based on MCR 2.116(C)(10) tests the factual sufficiency of the complaint and must be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court must consider the submitted evidence in the light most favorable to the nonmoving party. *Id*.; MCR

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[1] Plaintiffs dismissed allegations of retaliatory discharge and unlawful payroll deductions.

2.116(G)(5). If the evidence fails to establish that a disputed material issue of fact exists and that a party is entitled to judgment as a matter of law, summary disposition is properly granted. MCR 2.116(C)(10), (G)(4); *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

"'[A] default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue.'" *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 79; 618 NW2d 66 (2000), quoting *Wood v DAIIE*, 413 Mich 573, 578; 321 NW2d 653 (1982). A party's default does not act as an admission as to damages, however, and "a defaulting party has a right to participate if further proceedings are necessary to determine the amount of damages." *Wood*, *supra* at 578. Even though a valid default has been entered, "the defaulting party remains entitled to full participatory rights in any hearing necessary for the adjudication of damages." *Perry v Perry*, 176 Mich App 762, 767; 440 NW2d 93 (1989); see also *Wood*, *supra* at 578, 590, and MCR 2.603(B)(3)(b).

Applying the above principles, the well-pleaded factual allegations of plaintiffs' complaint must be accepted as true. Plaintiffs allege in ¶ 4 of their complaint that defendant Avore is the president and owner of DSA. Plaintiffs also allege a singular "Defendant" offered them employment in March 2007, ¶ 5, and they worked for a singular "Defendant" until about October 20, 2007, ¶ 6. Plaintiffs' complaint does not identify defendant Avore as their employer but only as the president and owner of DSA. The evidence plaintiffs and defendants submitted to the trial court, however, established that DSA employed plaintiffs. Finally, plaintiffs' complaint sets forth no facts on which to base a claim for piercing the corporate veil. See *Rymal v Baergen*, 262 Mich App 274, 292-294; 686 NW2d 241 (2004). "The law treats a corporation as an entirely separate entity from its shareholders, even where one individual owns all the corporation's stock." *Id*. at 293. The trial court properly granted summary disposition to defendant Avore because the undisputed facts did not establish he owed damages to plaintiffs for the claims they asserted.

We note that plaintiffs argued below that the broad definition of "employer" in 29 USC 203(d)[2] permits imposition of personal liability on defendant Avore for damages under the FLSA. But plaintiffs did not assert this argument until bringing an untimely motion for reconsideration. See *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987) (a trial court does not abuse its discretion by not considering new evidence or legal theories raised for the first time on a motion for reconsideration). Further, plaintiffs have not properly addressed this argument on appeal, thereby abandoning it. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Additionally, the definition of "employer" under FLSA does not alter the undisputed facts before the trial court at the time the motion for summary disposition was decided, including plaintiffs' complaint, which established that DSA employed plaintiffs, not defendant Avore.

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[2] "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization." 29 USC 203(d).

Plaintiffs next argue that the trial court abused its discretion by not awarding liquidated damages under 29 USC 216(b) with respect to two hours of mandatory training for which they were not paid. We agree.

We review de novo the interpretation and application of statutes and court rules to particular facts as questions of law. *Rymal*, *supra* at 290; *In re Gosnell*, 234 Mich App 326, 333; 594 NW2d 90 (1999). But our review is limited to finding abuse where a court rule or statute vests discretion in the trial court. *Marposs Corp v Autocam Corp*, 183 Mich App 166, 170-171; 454 NW2d 194 (1990). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). We review the trial court's findings of fact for clear error, according deference to the court's special opportunity to judge the credibility of witnesses. MCR 2.613(C).

Those employers covered by the FLSA must pay their employees at least the federal hourly minimum wage in effect at the time work is performed. If employers fail to do so, they are liable to the employee for that amount, plus an equal amount as "liquidated" damages. The federal statutory scheme at issue provides, in pertinent part, as follows:

> Every employer shall pay to each of his employees . . . who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this Act . . . wages at the following rate: . . . not less than the minimum wage rate in effect under subsection (a)(1). [29 USC 206(b).]
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> Any employer who violates the provisions of section 6 or section 7 of this Act [29 USC 206 or 207] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. . . . [29 USC 216(b).]

Early on, the Supreme Court held as a matter of statutory construction that an employee could not waive his or her right to the minimum wage, overtime pay, or liquidated damages provided for in the FLSA. *Brooklyn Savings Bank v O'Neil*, 324 US 697, 707, 713; 65 S Ct 895; 89 L Ed 1296 (1945). After *Brooklyn Savings Bank* was decided, however, Congress conferred discretion on courts hearing FLSA actions to deny or limit liquidated damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the" FLSA. 29 USC 260. To avoid imposition of liquidated damages, an employer that violates the FLSA must establish "*both* good faith and reasonable grounds" for its actions. *Martin v Ind Mich Power Co*, 381 F3d 574, 584 (CA 6, 2004). To establish good faith requires the employer to show it took affirmative steps to ascertain the requirements of FLSA. *Id*.

In the present case, DSA hired plaintiffs to be telephone salesmen of its debt negotiation services. It is undisputed that for the first two hours of employment, plaintiffs were only paid a commission if they made a "sale" by signing a client up for DSA's service. Plaintiffs referred to this as mandatory training. Defendants admitted that plaintiffs were not paid the federal minimum hourly wage for these first two hours of employment, which defendants claimed was an interview to determine if plaintiffs could perform the cold-calling telemarketing required by the job. Thus, defendants assert that plaintiffs agreed to work on a commission-only basis for their first two hours of employment. Defendants also contend plaintiffs' average hourly pay for their first pay period exceeded the federal minimum wage. The trial court did not address this claim and defendants offer no argument regarding it on appeal.

Plaintiffs argue they are entitled to payment of not less then the federal minimum wage for their initial two hours of employment whether those hours were for training or an interview. Defendants conceded plaintiffs engaged in cold-call telemarketing during the two hours at issue and would have been paid a commission had they secured a client for DSA. Plaintiffs cite in support of their argument, *Dade County, Fla v Alvarez*, 124 F3d 1380 (CA 11, 1997). That case notes that courts have construed "work" or "employment" under the FLSA "to mean all activities 'controlled or required by the employer and pursued necessarily and primarily for the benefit of his employer and his business.'" *Id*. at 1384, quoting *Tennessee Coal, Iron & R Co v Muscoda Local No. 123*, 321 US 590, 598; 64 S Ct 698; 88 L Ed 949 (1944). Plaintiffs also cite federal regulations regarding when activities need not be compensated.

> Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:
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> (a) Attendance is outside of the employee's regular working hours;
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> (b) Attendance is in fact voluntary;
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> (c) The course, lecture, or meeting is not directly related to the employee's job; and
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> (d) The employee does not perform any productive work during such attendance. [29 CFR 785.27.]

Because plaintiffs were engaged in sales efforts on behalf of DSA during the two hours at issue, they were engaged in "work" under the FLSA and the authority cited above.

Defendants' first excuse for not paying plaintiffs at least the federal minimum wage for their first two hours of work appears to be one of waiver. In light of *Brooklyn Savings Bank*, *supra*, this theory is unavailing. Defendants' second excuse, that plaintiffs were, in fact, paid at least the federal minimum wage when considering the average hourly rate of pay for their first work period, has some merit.[3] The problem with defendants' argument is that they were

[3] The federal hourly minimum wage under FLSA was $5.15 at the time plaintiffs were hired and (continued…)

defaulted by failing to timely answer plaintiffs' complaint, which alleged that plaintiffs were not compensated for the two hours at issue. Defendants' "default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue." *Wood, supra* at 578. Because the trial court failed to address this issue, and defendants offer no argument on appeal, we remand this matter to the trial court to amend the judgment to award each plaintiff 4 hours pay at $5.15 an hour[4] for a total for each plaintiff of $20.60. 29 USC 206(b); 29 USC 216(b).

Plaintiffs main claim to liquidated damages arises from the fact that they received paper paychecks rather then have their pay deposited to a bank account electronically. It is undisputed that plaintiffs always received their paychecks four to five days after other employees' accounts were credited with electronic deposits. Plaintiffs' assert that because their paychecks were paid after a "regular" payday, they were late, and therefore "unpaid" under FLSA, entitling plaintiffs to liquidated damages under 29 USC 216(b). Plaintiffs' theory of the case is based on *Biggs v Wilson*, 1 F3d 1537 (CA9, 1993). In that case, California state employees were paid 14-15 days late because the state legislature failed to adopt a budget before the fiscal year had expired. The Ninth Circuit Court of Appeals affirmed the district court and held that "under the FLSA wages are 'unpaid' unless they are paid on the employees' regular payday." *Biggs, supra* at 1538. The district court refused to award liquidated damages "because the liability under § 216(b) extends to an employer and the employer in this case, the State of California, was not named as a party; and because the state acted in good faith." *Id*. The Ninth Circuit Court of Appeals also noted that "[a]n employer who acts in good faith is not subject to liquidated damages, 29 U.S.C. § 260," and affirmed the district court. *Biggs, supra* at 1541, 1544.

The defendants' being defaulted settled the question of liability as to all well-pleaded allegations in plaintiffs' complaint. *Kalamazoo Oil Co, supra* at 79. But defendants' default does not preclude them from participating in hearings the trial court found necessary to determine damages. *Wood, supra* at 578, 590; *Perry, supra* at 767; MCR 2.603(B)(3)(b). Here, plaintiffs' complaint did not clearly identify their employer. Also, an employer that pays wages after a regular payday, and so "unpaid" under the FLSA as interpreted by *Biggs*, must be afforded the opportunity to establish its actions were in good faith and reasonable. *Martin, supra* at 584; *Biggs, supra* at 1541; 29 USC 260. The court rules provide: "If, in order for the court to enter a default judgment . . . it is necessary to . . . (ii) determine the amount of damages, . . . [or] (iv) investigate any other matter, the court may conduct hearings or order references it deems necessary and proper . . . ." MCR 2.603(B)(3)(b). We conclude that the trial court did not abuse its discretion by conducting hearings to determine appropriate damages to award plaintiffs.

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increased to $5.85 on or about July 24, 2007. 29 USC 206(a)(1). Payroll records filed in the trial court show that plaintiffs McCarthy and Cutler were first paid in March 2007; plaintiff Harris was first paid in June 2007. Each plaintiff's initial rate of pay was $8 an hour. If two hours were added to plaintiffs' first pay period and divided by their gross pay, plaintiffs average hourly rate of pay for that first workweek would have been as follows: McCarthy ($7.34); Cutler ($6.80); and Harris ($6.70). Thus, there is merit to defendants' contention that plaintiffs were paid "not less than the minimum wage rate in effect under subsection (a)(1)." 29 USC 206(b).

[4] See n 3, *supra*.

Plaintiffs argue that the trial court abused its discretion under 29 USC 260 by failing to award plaintiffs liquidated damages required by 29 USC 216(b). We disagree.

Because defendants were in default, the trial court accepted plaintiffs' legal theory and factual claims with respect to liability, i.e., that their paychecks were "unpaid" under FLSA when habitually "late" 4-5 days. *Biggs*, *supra* at 1538; *Wood*, *supra* at 578. However, defendants presented evidence to the trial court that DSA's regular paydays were the 10th and the 25th of each month, and that defendants delivered plaintiffs' paychecks on those regular paydays. Furthermore, plaintiffs did not dispute that other employees received their compensation for the same work period before plaintiffs because the other employees agreed to be paid by electronic deposit to a financial institution. Plaintiffs insisted on being paid by paper checks, resulting in mail delays. DSA's manager also retained the paper checks until the designated paydays. Consequently, the trial court observed that had it heard the merits of plaintiffs' late payment liability theory "it may be that defendants would have prevailed." Further, after ruling it would award plaintiffs interest on the "late" payments, and an attorney fee of $1,000 for each plaintiff, the court observed that defendants "probably could have avoided any of these costs, had they timely filed an answer . . . ." Thus, the trial court implicitly found that had a trial on liability occurred, the court "probably" would have found that defendants had not violated the FLSA. In essence, the trial court ruled that defendants presented sufficient evidence to sustain the civil burden of proof that they did not violate the FLSA with respect to delivering paychecks late. If DSA did not violate the FLSA, then *a fortiori*, DSA acted in "good faith" and with "reasonable grounds for believing" that its actions did not violate the FLSA. 29 USC 260; *Martin*, *supra* at 584; *Biggs*, *supra* at 1541. We conclude that the remedy the trial court fashioned regarding plaintiffs' receiving their paychecks late was within the range of reasonable and principled outcomes, and therefore, not an abuse of the court's discretion. *Saffian*, *supra* at 12.

We affirm but remand for modification of the judgment consistent with this opinion. Neither party having fully prevailed, no costs are awarded. MCR 7.219. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Christopher M. Murray