IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JASON (GABRIEL) FELIX, Respondent, v. DR. HAROLD ROBERT G. TROUT, aka ROBERT TROUT, a married man; and PICO COMPUTING INC., a Washington corporation, Appellants.	)	No. 67226-6-I DIVISION ONE UNPUBLISHED OPINION FILED: February 4, 2013

Appelwick, J. — Pico alleges the trial court erred when it awarded Felix his withheld wages, double damages on the undisputed portion of his wages, and attorney fees. Pico conceded it owed Felix money when he left the company, but disputed the amount due and now argues that it does not owe wages because Felix merely made a loan to Pico in exchange for stock options. The evidence does not support the assertion that Felix made a loan in exchange for stock options. The withholding of wages was willful. An employee is entitled to his wages, double damages on the undisputed portion of wages, and attorney fees when an employer willfully withholds

them. We affirm.

FACTS

Pico Computing, Inc. designs, manufactures, and sells computer hardware, code breaking systems, and software. Its president is Robert Trout.

Jason Felix worked for Pico as an electrical engineer from October 2004 until December 14, 2007. His salary was $90,000 per year. But, he was told when he started that he could elect to receive his salary in the form of stock, cash, or any combination of the two. His right to make that election did not require any approval from the company. He later signed a shareholder agreement that confirmed the arrangement:

> 2.1.1. Option of an Employee to Purchase Shares. Any employee of the Corporation with at least one year of service or whose first day of employment was before Nov[ember] 5th, 2005, shall be eligible to purchase shares of the Corporation in such amounts as may be set forth by the Board of Directors.
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> 2.1.2. An employee may choose to defer all or part of his salary in expectation of purchasing stock in the Corporation upon meeting the one year requirement.

At the beginning of his employment, Felix elected to take his entire salary in stock. In 2006, he elected to take approximately half of his salary in stock and half in cash wages. In January 2007, Felix told Trout orally that he wanted to receive all compensation in cash wages. Felix sent Trout written notice of his election on February 7, 2007.

In March 2007, Felix gave Pico "permission to defer up to half of my bi-monthly salary until sufficient financial resources are available to make full payment." He noted, "This is not an authorization to trade salary for stock." Felix testified that the

arrangement was "like an interest-free loan type of thing."

After Felix left the company in December 2007, Pico failed to pay the deferred salary it still owed Felix. Felix sued to recover his deferred salary.[1] To avoid the remedies available to an employee when an employer withholds wages, Pico argued that Felix traded stock for "essentially a dividend, profit sharing" in the future; that anything owed Felix was not wages. And, although Trout conceded that Pico owed Felix $30,105, he claimed that he withheld all payment because he and Felix could not reach an agreement regarding how much was due and Pico did not have sufficient financial resources.

The trial court concluded that the amount owed to Felix was wages within the statutory definition of chapter 49.48 RCW and chapter 49.52 RCW. It found that the wages were withheld between February 7, the date Felix sent written notice to Trout, and December 14, 2007. It calculated that the total amount of withheld wages was $32,884. It awarded Felix those wages and an additional $30,105 in double damages for the portion of wages Trout conceded Pico owed. It held Trout jointly and severally liable, because he was an officer and personally made the decision to withhold Felix's salary. Pico and Trout (collectively "Pico") appeal.

DISCUSSION

Pico's primary argument on appeal is that the amount it owed Felix does not fall within the statutory definition of wages. It also argues that withholding was not willful because there was a bona fide dispute, that the trial court's calculation of damages is

[1] The parties have not briefed whether Pico's practice of allowing employees to accrue stock in lieu of cash wages or Felix's authorization to defer salary violate chapter 49.48 RCW, chapter 49.52 RCW, or any other law.

not supported by substantial evidence, that the trial court abused its discretion by admitting an e-mail allegedly written in the context of settlement negotiations, and that Felix's attorney fees were neither timely requested nor reasonable.

When the trial court enters findings of fact and conclusions of law, review is limited to determining if the findings of fact are supported by substantial evidence and if the findings of fact support the conclusions of law. Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn. App. 422, 425, 10 P.3d 417 (2000). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the declared premise. Merriman v. Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). Appellants must formally assign error to each challenged finding of fact and offer argument in support of each challenge. RAP 10.3(a)(4). The only finding of fact that Pico assigned error to is the trial court's finding that Felix made his election in February 2007. Unchallenged findings are verities on appeal. In re Marriage of Brewer, 137 Wn.2d 756, 766, 976 P.2d 102 (1999).

I. Definition of Wages

When an employer withholds wages, an employee is entitled to both recovery of unpaid wages and reasonable attorney fees. RCW 49.48.010; RCW 49.48.030. When the employer intentionally withholds the wages, the employee can recover double damages and attorney fees. RCW 49.52.050; RCW 49.52.070. But, those remedies are only available if the amount withheld qualifies as "wages." RCW 49.46.010(7) defines "wage" as "compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as

may be permitted by rules of the director."

The trial court found that Felix's salary was $90,000 and that it was within his sole discretion to receive the salary in cash, stock, or any combination of the two. Pico does not assign error to the trial court's findings, and they are verities on appeal. Those findings, in turn, support the trial court's conclusion that Pico owed Felix wages.

Even if we were to consider his arguments as implicitly contesting the findings, Pico's arguments to the contrary are unpersuasive. Pico asserts that Felix had only a "nominal" salary of $90,000 and that the parties agreed his salary was actually $45,000 and he would receive the balance in stock. It argues that Felix merely exchanged stock options for a loan and that stock options are not wages.[2] Pico emphasizes that "Felix knew when he made the loan he was trading stock options . . . for a loan," and that "[c]learly this is a stock option and not a salary."

But, stock options are a contractual right to buy stock. Int'l Bus. Machines Corp. v. Bajorek, 191 F.3d 1033, 1039 (9th Cir. 1999). Pico's attorney conceded at oral argument that even under its version of the facts, which contradict the trial court's unchallenged findings, there were no stock options in this case as contemplated by the cases it relies on. Felix simply elected to receive cash wages rather than stock, and then agreed to defer payment of part of that cash salary. He did not, as Pico asserts in its briefing, "exchange his right to purchase" stock for a loan.

To support its assertion that Felix made a "loan," Pico relies exclusively on

[2] Washington courts have not considered whether stock options are wages, but other jurisdictions have ruled that they are not. See, e.g., Int'l Bus. Machines Corp. v. Bajorek, 191 F.3d 1033, 1039 (9th Cir. 1999); Hmelyar v. Phoenix Controls, 339 Ill. App. 3d 700, 706, 791 N.E. 2d 695 (2003).

Felix's written permission to defer and his testimony that he decided to defer payment "'until the company has sufficient financial resources to pay it'" and made "an interest-free loan type of thing." But, Felix's authorization to defer payment is immaterial to the issue before us: whether Pico owed Felix wages. Even Trout referred to the amount owed as Felix's salary, not a loan in exchange for stock options. In an e-mail to Felix, Trout performed a series of calculations and described the $90,000 as Felix's "full salary" that was subject to social security withholding. At trial, Trout testified that after Felix elected to receive his entire salary in cash, they agreed to treat it as "deferred salary." Pico owed Felix wages. The only remaining issues are how much Pico owed Felix and whether the wages were willfully withheld.

II. Bona Fide Dispute

In addition to recovering withheld wages, an employee is entitled to double damages and reasonable attorney fees and costs when the wages are willfully withheld. RCW 49.52.050; RCW 49.52.070. Willful means that the employer knows what it is doing and intends to do what it is doing. Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 159-60, 961 P.2d 371 (1998). Thus, an employer's failure to pay wages is willful unless it was careless or erred in failing to pay, or there was a bona fide dispute regarding payment. Id. at 160. Whether a bona fide dispute exists is a question of fact that must be supported by substantial evidence. Lillig v. Becton-Dickinson, 105 Wn.2d 653, 660, 717 P.2d 1371 (1986). A bona fide dispute about the amount owed does not enable an employer to withhold undisputed wages. The rule only allows an employer to withhold the disputed portion of wages. See Allstot v. Edwards, 114 Wn. App. 625, 634, 60 P.3d 601 (2002). Here, Trout conceded that Pico owed Felix $30,105. The

trial court only awarded double damages for that undisputed portion of wages. It did not err.

Further, the trial court determined that Trout was not credible and specifically stated it did not believe that Trout refused to pay Felix's salary on the grounds he claimed at trial. Credibility determinations are not reviewable on appeal. In re Marriage of Rideout, 150 Wn.2d 337, 351-52, 77 P.3d 1174 (2003).

III. Election Date

The trial court found that Felix elected to receive an all cash salary on February 7, 2007. It used that date to calculate how much Pico owed Felix.

Pico claims that Felix asserted the start date was in January 2007, Pico asserted the date was in April 2007, and nobody asserted that the start date was in February. Thus, it argues that an election date in February 2007 was not within the universe of possible findings.

Pico's argument ignores the record. Indeed, Felix did give oral notice of his intention to receive his entire salary in cash in January 2007. But, he gave written notice of his election on February 7, 2007. There is substantial evidence to support the trial court's determination that Felix's election was effective when he provided written notice. It was not error to use the date of written notice to calculate the disputed balance of wages owed.

IV. Admission of E-mail Discussions Concerning the Amount Due

The trial court admitted an e-mail chain between Felix and Trout in which they discussed how much Pico still owed Felix. Felix explained the calculations he made to determine that the total amount of outstanding wages was $39,808. He asked Trout if

that figure seemed correct. Trout responded that the calculations were not quite correct and that the amount should be $37,788. In admitting the e-mail, the trial court explained:

> The Court will admit it. There is nothing on the face of the document itself that says: There is my settlement offer, this is in - - for settlement. There is nothing on the face of the document that says that this is for settlement. So I will allow its admission.
>
> Clearly counsel can introduce other evidence that the Court could reconsider. But on the face of the document itself, its admissible.

Pico argues that the e-mail was a settlement negotiation that should have been excluded pursuant to ER 408. It claims that without the e-mail Felix would not have survived Pico's motion for a directed verdict at the close of Felix's case, because the e-mail was the only evidence of the amount of wages due. But, Pico waived its opportunity to challenge denial of its motion for directed verdict by proceeding with trial and presenting evidence after the trial court denied the motion. See Hume v. Am. Disposal Co., 124 Wn.2d 656, 666, 880 P.2d 988 (1994); Goodman v. Bethel Sch. Dist. No. 403, 84 Wn.2d 120, 123, 524 P.2d 918 (1974). And, even if he had not waived the challenge, Pico's assertion that the e-mail was the only evidence of the wages due is not supported by the record. Felix testified that his salary was $90,000 and he was only paid $48,750 in 2007. His last day of employment was December 14, 2007. He testified that he was paid every two weeks. His written election to receive his entire salary in cash was introduced. The e-mail was not the only evidence of the amount of wages due.

Moreover, we review a trial court's evidentiary decision for an abuse of discretion. Hensrude v. Sloss, 150 Wn. App. 853, 860, 209 P.3d 543 (2009). An

abuse of discretion occurs when the trial court's decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. McEnry, 124 Wn. App. 918, 924, 103 P.3d 848 (2004). Pico has not shown that the trial court abused its discretion by admitting the e-mail.

Evidence of settlement negotiations is inadmissible pursuant to ER 408. The purpose of the rule is to promote compromise and settlement by eliminating the potentially corrosive effect that settlement evidence could have on the trier of fact. Northington v. Sivo, 102 Wn. App. 545, 550, 8 P.3d 1067 (2000). Pico's argument is limited to reciting this indisputable rule. It does not offer any evidence establishing that the e-mail in question falls within ER 408's purview. Instead, it asserts without citation that "there were multiple attempts between the parties to determine what amount was due," and that "[d]iscussions regarding the calculation of the amount due are certainly settlement communications."

Each of those assertions is flawed. First, Pico has not pointed to any other evidence establishing that the e-mail was written within the context of settlement negotiations. As the trial court noted, Pico was free to offer further evidence that provided context for the e-mail. It did not do so. We agree that an e-mail is not prohibited by ER 408 when it does not appear on its face to be a settlement negotiation and the party seeking its exclusion has not otherwise shown that it is in fact part of a settlement negotiation. Second, the mere fact that there was a discussion of how much Pico owed Felix does not mean the e-mail was part of settlement negotiations. As Pico itself argues, "The point at which a claim is asserted, thus triggering the rule, is normally the filing of the action." 5D Karl B. Tegland, Washington Practice: Courtroom

handbook on Washington Evidence CR 408 author's cmts. at 266 (2012-13 ed.). But, "[p]refilling statements may be barred if made after an actual dispute has arisen and when litigation is imminent." Id. Felix had not sued at the time the e-mail was written. Pico has not cited any portion of the record establishing that an actual dispute had arisen and that litigation was imminent. The trial court did not abuse its discretion by admitting the e-mail.

V. Attorney Fee Award

Pico argues that Felix did not timely file his motion for attorney fees and that the attorney fee award was unreasonable. The trial court entered judgment on July 19 and Felix timely filed his motion 10 days later on July 29. Nevertheless, Pico claims that "[t]he fee motion was originally filed timely; but Mr. Felix struck that motion, then [refiled] it, well past the ten day time frame." The record does not support that statement.

We review an attorney fee award for an abuse of discretion. Morgan v. Kingen, 166 Wn.2d 526, 539, 210 P.3d 995 (2009). Pico makes general arguments that Felix's attorney's hourly rate was not reasonable and that the large fee award was disproportionate to the amount at issue. Pico claims an hourly rate of $350 is unreasonable, because Felix's attorney previously sought only $350 total for 2.8 hours of work to file a motion to compel. But, Felix's attorney submitted a statement in support of the motion for attorney fees that stated his usual rate was $350 and that $350 was a reasonable rate for a Seattle attorney with a similar level of experience. Pico does not provide any contrary evidence and has not shown an abuse of discretion.

Pico further argues that it was unreasonable to award over $77,000 in attorney

fees when there was approximately $35,000 in dispute. But, a fee award is not necessarily unreasonable just because it is disproportionate to the amount of damages at stake. Mahler v. Szucs, 135 Wn.2d 398, 433, 957 P.2d 632 (1998). And, in arguing that there was only $35,000 at stake, Pico neglects that there were double damages at issue.

Beyond those general arguments, Pico argues specific entries were unreasonable. It claims that they were incurred "in preparing a variety of documents and pleadings which were either not used or unsuccessful." The premise of that argument is faulty because the ultimate issue is whether fees were reasonably necessary, not whether the party collecting fees succeeded on each motion or theory. See, e.g., Brand v. Dep't of Labor & Indus., 139 Wn.2d 659, 672, 989 P.2d 1111 (1999).

Below, Pico clearly enunciated its various challenges. Its arguments were interspersed with the specific entries it was challenging. The trial court considered the challenges, discounted some hours, and entered findings of fact. It determined that, although not all of Felix's attorney's work was successful, it was all related to facts and legal theories that were inextricably linked with the facts and theories upon which Felix ultimately succeeded. Pico's argument is limited to copying its specific challenges from below verbatim into its briefing. It has not shown that the trial court committed an abuse of discretion.

VI. Attorney Fees on Appeal

As the prevailing party, Felix is entitled to his attorney fees pursuant to chapter 49.48 RCW, chapter 49.52 RCW, and RAP 18.1. We award him his reasonable fees

and costs on appeal.

We affirm.

Appelwick, J.

WE CONCUR:

Leach, C.J.