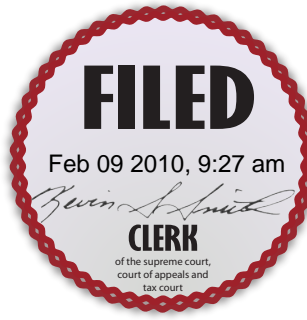


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEY FOR APPELLEE:

RONALD E. WELDY
Weldy & Associates
Indianapolis, Indiana

P. JEFFREY SCHLESINGER
Merrillville, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ELVERA D. NICHOLSON (formerly)
DEFELICE),)
)
Appellant-Plaintiff,)
)
vs.)
)
CARLEE, INC. d/b/a LEROY'S)
HOT STUFF,)
)
Appellee-Defendant.)

No. 64A05-0908-CV-457

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Clay M. Patton, Judge Pro Tempore
Cause No. 64D03-0805-SC-2997

February 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Elvera D. Nicholson (formerly Defelice) appeals the small claims court's judgment in favor of her former employer, Carlee, Inc. d/b/a Leroy's Hot Stuff ("Carlee"), on her claim for liquidated damages and attorney fees pursuant to the Wage Claims Statute, Indiana Code Chapter 22-2-9, or, in the alternative, the Wage Payment Statute, Indiana Code Chapter 22-2-5. The sole issue presented for our review is whether the trial court erred when it entered judgment in favor of Carlee. We affirm.

Facts and Procedural History

Nicholson began working as a server and a bartender at Leroy's Hot Stuff, a restaurant and bar operated by Carlee, on May 1, 2006. The owner of Carlee, Leroy Flores, hired Nicholson after her boyfriend, a friend of Flores, was killed in a motorcycle accident. Flores did not ask Nicholson to fill out any tax forms or paperwork when he hired her. Accordingly, Flores was never made aware of Nicholson's address. To Flores's knowledge, at the time he hired her, Nicholson was in the process of being evicted from her home and her address would be changing.

On Friday, May 26, 2006, Nicholson called Flores and stated that she had sprained her ankle and could not come to work. Flores informed Nicholson that if she was going to miss more than one day of work that she would need to bring in a doctor's note. That was the last time Flores spoke with Nicholson. Flores kept Nicholson on the schedule assuming that she would be returning. Nicholson never called or returned to work. Nicholson did subsequently come to Leroy's Hot Stuff on one occasion. On that occasion, Nicholson asked Flores's

daughter, Erica, if she could have her final paycheck. Because Flores was not present at the restaurant, Erica told Nicholson that she needed to return when Flores was present and that he would pay her. Nicholson did not leave an address to which her paycheck could be mailed. Nicholson never returned to Leroy's Hot Stuff.

Flores filed a wage claim with the Indiana Department of Labor on June 20, 2006, claiming \$292.00 of unpaid final wages. The Department of Labor sent its notice of wage claim to Carlee requesting payment of Nicholson's final wages by July 5, 2006. Carlee paid the claim in full to Nicholson by check dated July 4, 2006.

Thereafter, Nicholson filed a notice of claim against Carlee, and a small claims bench trial was held on April 29, 2009. Because Nicholson had already been paid her final wages, during trial, Nicholson sought liquidated damages and attorney fees from Carlee. After hearing evidence and testimony from both parties, the trial court took the matter under advisement. The trial court issued findings and entered judgment in favor of Carlee on April 30, 2009. Nicholson filed a motion to correct error. On July 9, 2009, the trial court denied Nicholson's motion and, instead, entered additional findings and judgment in favor of Carlee. This appeal followed.

Discussion and Decision

Judgments entered by small claims courts are "subject to review as prescribed by relevant Indiana rules and statutes." Ind. Small Claims Rule 11(A). Under Trial Rule 52(A), the clearly erroneous standard applies to appellate review of findings of fact determined in a bench trial with due regard given to the opportunity of the trial court to assess the credibility

of witnesses. *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1067 (Ind. 2006). Our review is particularly deferential 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)). This deferential standard does not apply, however, to the substantive rules of law, which are reviewed de novo just as they are in appeals from a court of general jurisdiction. *Trinity Homes*, 848 N.E.2d at 1067-68. The parties in a small claims court bear the same burden of proof as they would in a regular civil action on the same issues. *LTL Truck Serv., LLC v. Safeguard, Inc.*, 817 N.E.2d 664, 668 (Ind. Ct. App. 2004). Therefore, the party who bears the burden of proof must demonstrate that he or she is entitled to the recovery sought. *Id.*

Wage Payment Statute

We begin by noting that Nicholson has already been paid the wages due her from Carlee. This case is about penalties and attorney fees for the “late” payment of those wages.¹ Specifically, Nicholson seeks liquidated damages and attorney fees pursuant to the Wage Claims Statute, Indiana Code Chapter 22-2-9, or, in the alternative, the Wage Payment Statute, Indiana Code Chapter 22-2-5.

Our supreme court has noted the differences between these two statutes and the different procedural frameworks set forth by each for wage disputes. *Naugle v. Beech Grove*

¹ The record indicates that Nicholson sought liquidated damages of \$584.00 for the late payment of her wages. Nicholson’s attorney sought \$2,854.09 in fees at trial with an additional demand of \$427.50 for preparation of a motion to correct error.

City Schools, 864 N.E.2d 1058, 1061 (Ind. 2007); *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 704-05 (Ind. 2002).² Most significantly, each statute applies to different categories of claimants. *See St. Vincent Hosp.*, 766 N.E.2d at 705. The Wage Claims Statute applies to 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)). The Wage Payment Statute, by contrast, applies to current employees and those who have voluntarily left employment, either permanently or temporarily. *Id.* (citing Ind. Code § 22-2-5-1(b)). Thus, we must first address Nicholson’s contention that the trial court erred when it found that Nicholson voluntarily left her employment with Carlee.

Flores testified that Nicholson called him and stated that she had sprained her ankle and could not come to work. Flores stated, “I told her if she is going to be out more than one day, she need [sic] a doctor’s excuse.” Tr. at 51. Flores testified that Nicholson never called or returned to work. Flores testified that he did not terminate Nicholson’s employment but, instead, that Nicholson just never showed up at work again. Indeed, Flores stated that he even scheduled more hours for Nicholson because it was his belief that Nicholson was taking only one day off and that she was planning to return. *Id.* at 58. Nicholson points to her conflicting testimony that she believed her employment had been terminated however; it

² While claimants may proceed under the Wage Payment Statute by filing a complaint, the Wage Claims Statute requires that a wage claim be first submitted to the Department of Labor for administrative enforcement. *Naugle*, 864 N.E.2d at 1061, fn.1.

is not our prerogative to reweigh the evidence or reassess witness credibility. The record supports the trial court's finding that Nicholson voluntarily left her employment with Carlee.

As such, we agree with the trial court that the Wage Payment Statute, and not the Wage Claims Statute, applies to Nicholson's claim, and we now turn to the relevant provision.³ Specifically, Indiana Code Section 22-2-5-1(b) provides in pertinent part:

[I]f 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. If an employee leaves employment voluntarily, and without the employee's whereabouts or address being known to the employer, the employer is not subject to section 2 of this chapter until:

- (1) ten (10) business days have elapsed after the employee has made a demand for the wages due the employee; or
- (2) the employee has furnished the employer with the employee's address where the wages may be sent or forwarded.

Section 2 of the chapter provides that an employer who fails to make payment as provided in section 1 shall be liable for liquidated damages and attorney fees. Ind. Code § 22-2-5-2. This penalty provision is mandatory upon violation of the statute. *Naugle*, 864 N.E.2d at 1065.

Nicholson contends that the trial court erroneously concluded that the penalties outlined in Indiana Code Section 22-2-5-2 were not available to her because she neither demanded her wages from Carlee nor furnished her address to Carlee as required by Indiana

³ Nicholson indeed submitted a wage claim to the Department of Labor as procedurally required by the Wage Claims Statute. However, because we conclude that the record supports the trial court's finding that Nicholson was not fired but rather voluntarily left her employment, we need not address Nicholson's request for liquidated damages and attorney fees pursuant to the Wage Claims Statute, as she is not the type of claimant to whom that claim is available. *See St. Vincent Hosp.*, 766 N.E.2d at 705. Instead, we address Nicholson's claim solely pursuant to the Wage Payment Statute.

Code Section 22-2-5-1(b). As provided, if the employee leaves voluntarily without the employee's whereabouts or address known to the employer, liquidated damages and attorney fees are not available until ten business days have elapsed since the employee has demanded payment or the employee has furnished the employer with an address to which to send the unpaid wages. Ind. Code § 22-2-5-1(b)(1),-(2).

Here, the record is clear that, at the time Nicholson left her employment, Carlee was unaware of Nicholson's address or whereabouts. Nicholson testified that she was in the process of being evicted when she took the job with Carlee. Tr. at 30. Flores testified that during the less than one month period that Nicholson worked for his restaurant he paid her only in person and in cash. He knew that she was being evicted and thought that he could help her out. He stated that he never had occasion to seek her address, so, when Nicholson abruptly failed to return to work, her whereabouts were unknown to him. Both Flores and his daughter, Erica, testified that, following Nicholson's voluntary separation from employment, Nicholson returned to the restaurant on one occasion. However, Flores was not present at the time. Erica informed Nicholson that only Flores had authority to pay her and told her to return at a time when Flores was present. Erica testified that Nicholson did not leave an address with her, and Erica believed that Nicholson would return. To Erica's knowledge, Nicholson never returned.

Although Nicholson claimed that she returned to the restaurant on three occasions to request her wages, the trial court did not find her testimony credible. Nicholson admitted that she never spoke to Flores on any of the occasions she claimed to have returned. As noted by

the trial court, the record is clear that any request made by Nicholson for her wages was made to her former co-workers and not to Flores or to any person with authority to pay her the wages due. Moreover, Nicholson admitted that she never left her address with anyone on these claimed visits.

Based upon the evidence and the reasonable inferences to be drawn therefrom, we agree with the trial court's finding that the first demand for payment as well as the first occasion that Carlee was informed of Nicholson's address occurred when Carlee received the notice of wage claim from the Indiana Department of Labor. Carlee paid Nicholson \$292.00, the full amount of unpaid wages claimed by Nicholson, as soon as Carlee received notice of the claim from the Department of Labor. Because Carlee paid the wages within ten business days of learning of Nicholson's whereabouts as required by Indiana Code Section 22-2-5-1(b), Carlee is not liable for liquidated damages and attorney fees pursuant to Indiana Code Section 22-2-5-2. We cannot say that the trial court's findings or judgment are clearly erroneous.

Nicholson further maintains that the trial court should have applied the doctrine of "unclean hands" to Carlee and entered judgment in her favor. Specifically, Nicholson argues that had Carlee asked her to complete tax forms when she was hired, then Carlee would have had her address. First, for the unclean hands doctrine to apply, the misconduct must be intentional and the alleged wrong must have an "immediate and necessary relation to the matter being litigated." *Prime Mortg. USA, Inc. v. Nichols*, 885 N.E.2d 628, 665 (Ind. Ct. App. 2008) (quoting *Fairway Developers, Inc. v. Marcum*, 832 N.E.2d 581, 584 (Ind. Ct.

App. 2005), *trans. denied*). There is absolutely nothing in the record to indicate that Carlee engaged in any intentional misconduct. To the contrary, Flores testified that he hired Nicholson as a favor and stated that “I just didn’t follow the right procedures as I should of because she was a friend of mine, or thought she was.” Tr. at 53. This testimony supports an inference that Carlee’s failure to have Nicholson complete tax forms was a case of mere negligence, as opposed to intentional misconduct. Moreover, the doctrine of unclean hands is not favored by the courts and is applied with much reluctance and scrutiny. *Prime Mortg. USA*, 885 N.E.2d at 665. Carlee’s behavior does not warrant application of the doctrine in this case. The trial court did not err, as a matter of law, when it declined to apply the doctrine of unclean hands.

While we are sensitive to an employer “playing fast and loose with wage obligations,” *St. Vincent Hospital.*, 766 N.E.2d at 706 (Boehm, J., concurring), that is not what occurred here. Carlee paid Nicholson her final wages as soon as her whereabouts became known. Nicholson has failed to meet her burden to demonstrate that Carlee violated the Wage Payment Statute. Thus, she is not entitled to the penalties outlined by Indiana Code Section 22-2-5-2.⁴

Affirmed.

RILEY, J., and VAIDIK, J., concur.

⁴ We admonish Nicholson’s counsel for his less-than-respectful references to the Judge Pro Tempore in this case. Instead, we commend the thoughtful and thorough review of the evidence and the law in this case by Judge Patton.