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IN THE
COURT OF APPEALS OF INDIANA

TRACI C. CHRISTENSEN,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 83A01-0701-CV-59
	)	
J.R. RUMPZA CHEVROLET, INC.,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE VERMILLION CIRCUIT COURT
The Honorable Robert A. Pell, Special Judge
Cause No. 83C01-0508-PL-7

November 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Traci D. Christensen appeals from the trial court's judgment in favor of J.R. Rumpza Chevrolet, Inc. ("J.R. Chevrolet"), on her unpaid wage claim. We remand for more specific findings and for a ruling on the issue of J.R. Chevrolet's allegedly improper withholding of Christensen's health insurance premiums.

Facts and Procedural History

J.R. Chevrolet hired Christensen as a clerical employee on February 11, 1994. In March 1997, Christensen resigned to take other employment. In December 1997, J.R. Chevrolet rehired Christensen. In 2000 or 2001, Christensen was promoted to office manager and continued in that position until J.R. Chevrolet terminated her employment on January 11, 2005.

On August 15, 2005, Christensen filed a complaint against J.R. Chevrolet, alleging that it had failed and refused to pay her "at least $1,020 in accrued vacation pay at the time of her termination" in violation of Indiana's Wage Claim Act.[1] Appellee's App. at 1.[2]

[1] *See, e.g.*, Ind. Code § 22-2-9-2(a) ("Whenever any employer separates any employee from the pay-roll, the unpaid wages or compensation of such employee shall become due and payable at regular pay day for pay period in which separation occurred[.]"); Ind. Code § 22-2-9-4(b) ("The commissioner of labor may refer claims for wages under this chapter to the attorney general, and the attorney general may initiate civil actions on behalf of the claimant or may refer the claim to any attorney admitted to the practice of law in Indiana. The provisions of IC 22-2-5-2 apply to civil actions initiated under this subsection by the attorney general or his designee."); Ind. Code § 22-2-5-2 ("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.").

Christensen requested all available damages, including "her unpaid accrued vacation pay" plus treble and liquidated damages and attorney's fees. *Id*. at 2.

A bench trial was held on November 30, 2006. Prior to the presentation of evidence, J.R. Chevrolet's counsel stated that there had been

> some allegations also made that there was more insurance withheld from [Christensen's] final paycheck than there should have been. We will present evidence to explain that J.R. Chevrolet paid its employees' premiums a month in advance, so that the premiums that were being withheld from Miss Christensen's paycheck in January of 2005 were reimbursing J.R. Chevrolet for the premiums they had paid in December of 2004.

Tr. at 6-7.

Christensen requested specific findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A). On December 11, 2006, both parties filed proposed findings and conclusions. On December 12, 2006, Christensen filed a motion to amend the pleadings to conform to the evidence pursuant to Indiana Trial Rule 15(B). Christensen claimed that evidence was presented at trial that J.R. Chevrolet's improperly withheld both insurance premiums and salary for two days' work from Christensen's last paycheck, and she requested findings "which conform to this evidence." Appellant's App. at 10. On December 13, 2006, J.R. Chevrolet filed an objection to Christensen's motion to amend, which stated that

> [t]hroughout this litigation, including during trial of this case, [Christensen] never alleged, contended or argued that she was not paid for days that she worked. The only two theories of recovery pursued by [Christensen] were that she was owed for unused vacation at the time [of] her termination and that too much was withheld from her final paycheck for health insurance.

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[2] Indiana Appellate Rule 50(A)(2)(f) provides that an appellant's appendix "shall contain … pleadings and other documents from the Clerk's Record in chronological order that are necessary for resolution of the issues raised on appeal[.]" Christensen's appellant's appendix does not contain a copy of her complaint, which is necessary for resolving the issues raised in her appeal. We thank J.R. Chevrolet for including the complaint in its appellee's appendix.

Appellee's App. at 19-20.

On December 29, 2006, the trial court issued an order that reads in pertinent part as follows:

> 4. [Christensen] began her employment with J.R. Chevrolet on or about February 11, 1994. She worked in an office clerical position.
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> 5. Christensen resigned from J.R. Chevrolet in approximately March, 1997 to take other employment.
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> 6. Christensen was rehired by J.R. Chevrolet at the very end of December, after Christmas, in 1997. J.R. Chevrolet owner, Michael Rightsell, was part owner and worked for J.R. Chevrolet at that time. Mr. Rightsell testified that he recalled Christensen's 1997 resignation and rehire and that he did not dispute her testimony that she had been rehired by J.R. Chevrolet at the very end of December, 1997.
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> 7. At the time Christensen was rehired, J.R. Chevrolet's Office Manager was Mary Jane Barnes. While the witnesses did not recall the exact date, at some time in 2000 or 2001, Ms. Barnes left J.R. Chevrolet and Christensen was promoted to the position of Office Manager. Christensen continued in that position until her termination on January 11, 2005.
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> 8. By the year 2000, Mr. Rightsell was the sole owner and operator of J.R. Chevrolet. He was sole owner and operator when he terminated Christensen on January 11, 2005.
>
> 9. J.R. Chevrolet had a long-standing paid vacation policy, but this policy was never communicated in writing to J.R. Chevrolet's employees.
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> 10. There was no dispute between the parties that J.R. Chevrolet required its employees to earn their vacation pay through work performed. Both sides agreed that J.R. Chevrolet had a long standing policy that an employee earned one week of vacation per year, but only after working for J.R. Chevrolet for one full year. The parties also agreed that the policy provided an employee with two weeks' paid vacation after the employee had worked for J.R. Chevrolet for four full years.

11. Both parties agreed that Christensen had worked for J.R. Chevrolet for far more than four years, and that Christensen had earned the right to take two weeks' paid vacation each year.

12. Regarding paid vacation, the dispute between Christensen and J.R. Chevrolet concerned the policy regarding the "year" in which paid vacation could be taken by an employee. Christensen was J.R. Chevrolet's office manager the last four years of her employment and she testified that she and the other employees simply used a calendar year (January 1st to December 31st) to take vacation, taking no more weeks of vacation during each calendar year than earned. Christensen contended that J.R. Chevrolet employees' paid vacation weeks were tracked on a calendar year basis. J.R. Chevrolet, through Mr. Rightsell's testimony, claimed that J.R. Chevrolet tracked each employee's paid vacation rights on a rolling calendar basis, based upon each employee's "hire" or "anniversary" date.

In light of the contradictory evidence on whether or not the anniversary of plaintiff's "hire date" triggered her right to vacation, the Court cannot say that plaintiff proved her case by a preponderance of the evidence.

The Court finds for the defendant. Plaintiff shall take nothing by way of her complaint.

Plaintiff's Motion to Amend Complaint to conform to the evidence is rendered moot.

Appellant's App. at 5-6. Christensen now appeals.

Discussion and Decision

Our standard of review in such cases is well settled:

When the trial court has entered findings of fact and conclusions of law upon the request of a party, pursuant to Indiana Trial Rule 52, we apply the following two-tiered standard of review: whether the evidence supports the findings and whether the findings support the judgment. The court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. We neither reweigh the evidence nor assess the credibility of witnesses, but consider only the evidence most favorable to the judgment.

> We define the clearly erroneous standard based on whether the party is appealing a negative judgment or an adverse judgment. Where, as here, the party who had the burden of proof at trial appeals, he appeals from a negative judgment and will prevail only if he establishes that the judgment is contrary to law. A judgment is contrary to law when the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead to only one conclusion, but the trial court reached a different conclusion.

Todd Heller, Inc. v. Ind. Dep't of Transp., 819 N.E.2d 140, 146 (Ind. Ct. App. 2004) (citations omitted), *trans. denied* (2005).

"When a party has requested special findings pursuant to Indiana Trial Rule 52(A), we may affirm the judgment on any legal theory supported by the findings." *McCarty v. Walsko*, 857 N.E.2d 439, 443 (Ind. Ct. App. 2006). "The court's failure to enter findings upon a material issue for which a finding is required can be challenged for incompleteness or inadequacy. [Ind. Trial Rule] 52(B) and (D). When the issue is immaterial or incidental, however, the trial court's failure to enter special findings does not amount to error." *Vukovits v. Bd. of Sch. Trs. of Rockville Cmty. Sch. Corp.*, 659 N.E.2d 174, 181 (Ind. Ct. App. 1995), *trans. denied* (1996).

In her complaint, Christensen alleged that J.R. Chevrolet violated the Wage Claim Act by failing to disburse $1020 in vacation pay that she had accrued at the time of her termination. Christensen's allegation is based on the premise that she accrued two weeks of paid vacation at the end of the 2004 calendar year, for which she was entitled to be paid upon the termination of her employment on January 11, 2005. As the trial court noted in its order, however, J.R. Chevrolet presented evidence that its employees accrued vacation on their anniversary date; that Christensen's anniversary date was February 11, notwithstanding that she left J.R. Chevrolet in March 1997 and was rehired in December 1997; that Christensen

had used the two weeks of vacation that she had accrued on February 11, 2004; and that she was not entitled to vacation pay because she was terminated prior to February 11, 2005.

The trial court went on to say, "In light of the contradictory evidence on whether or not the anniversary of plaintiff's 'hire date' triggered her right to vacation, the Court cannot say that plaintiff proved her case by a preponderance of the evidence." Appellant's App. at 6. We respectfully observe, however, that the success of Christensen's claim is wholly dependent upon a determination of the credibility of the parties' evidence regarding J.R. Chevrolet's unwritten vacation policy—a determination that the trial court specifically did not make in this case. Without such a finding, we may not affirm the trial court's judgment in favor of J.R. Chevrolet. To illustrate this point, we observe that a defendant may present substantially more evidence on a particular issue than the plaintiff, but the trial court may give the defendant's evidence no weight based on credibility concerns. Therefore, we must remand for more specific findings regarding Christensen's claim for vacation pay.[3]

Likewise, we must remand for specific findings on Christensen's claim that J.R. Chevrolet improperly withheld her health insurance premiums. That issue was litigated by consent of the parties and was entirely separate from the vacation pay issue. As such, we

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[3] On a related note, Christensen claims that she is entitled to at least a pro rata share of her vacation pay. J.R. Chevrolet owner Michael Rightsell testified that an employee's vacation "is not pro-rated and never has been." Tr. at 158. On remand, the trial court may need to resolve this conflicting evidence as well. We emphasize that a court

> does not find something to be a fact by merely reciting that a witness testified to X, Y, or Z. Rather, the trier of fact must find that what the witness testified to is the fact. Additionally, the trier of fact must adopt the testimony of the witness before the "finding" may be considered a finding of fact.

In re Adoption of T.J.F., 798 N.E.2d 867, 874 (Ind. Ct. App. 2003) (citation omitted).

cannot agree with the trial court's determination that Christensen's motion to amend the pleadings with respect to the health insurance issue is "moot."

We agree with J.R. Chevrolet, however, that the issue of whether it improperly withheld two days' salary was never litigated by consent of the parties. At trial, Christensen's counsel told J.R. Chevrolet owner Michael Rightsell, "We're not claiming that you underpaid daily wages or weekly wages." Tr. at 146. It is well settled that "[a] clear and unequivocal admission of fact by an attorney is a judicial admission which is binding on the client." *Parker v. State*, 676 N.E.2d 1083, 1086 (Ind. Ct. App. 1997). As such, the trial court need not address the withheld salary issue on remand.

Remanded.

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