[Cite as *Hudak v. Golubic*, 2018-Ohio-4874.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106819

GREGORY J. HUDAK

PLAINTIFF-APPELLANT

vs.

JOE GOLUBIC, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Civil Appeal from the
Parma Municipal Court
Case No. 17CVI05035

BEFORE: McCormack, P.J., Laster Mays, J., and Keough, J.

RELEASED AND JOURNALIZED: December 6, 2018

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TIM McCORMACK, P.J.:

{¶1} Plaintiff-appellant Gregory J. Hudak appeals from the judgment of the Parma Municipal Court, Small Claims Division, in his favor for $321.74. For the reasons that follow, we affirm in part and reverse in part.

{¶2} On November 29, 2017, Hudak filed a small claims complaint against Joe Golubic and Joe Golubic Water Proofing & Cement ("Golubic"). In his complaint, he stated: "My last day of work was 9-27-17. As of today, 11-29-17, I have not received my last pay check and my tools and personal property have not been returned to me. I believe I am protected under the Fair Labor Standard[s] Act." He claimed $3,600 damages plus court costs.

{¶3} On January 8, 2018, the court held a hearing in which Hudak and Golubic testified. Hudak testified that Golubic, his former employer, wrongfully withheld his last paycheck. He stated that his last day of employment was September 27, 2017, and he worked 35 hours at a rate of $26 per hour; therefore, he should have received a paycheck in the amount

of $910 for his wages. Hudak also testified that Golubic "stole" his work tools that remained at his place of employment, namely "cement floats," valued at $20. But Hudak stated that the "$20 tool [can] make [him] $250-$300 a day." On cross-examination, Hudak admitted that he did not immediately return his uniforms, but he denied that it was company policy that an employee must return uniforms in order to receive a final paycheck. Golubic offered Hudak a paycheck, but Hudak refused it, stating that the amount of the paycheck "was nowhere near the amount of money I was owed." Hudak also testified that he lost jobs because he did not have his tools. He conceded that he had no independent evidence of these job offers, and he provided no dollar amount of the alleged job offers he refused because he had no tools.

{¶4} Golubic confirmed that Hudak's last day of employment was September 26, 2017. He testified that Hudak worked 35 hours his last week at $26 per hour. Golubic offered into evidence a copy of Hudak's timesheet indicating the days Hudak worked from September 21, 2017, to September 26, 2017. Golubic also presented a copy of the pay stub for Hudak's final week. The pay stub reflected deductions as follows: $18.20 city tax; $135 federal tax; $56.42 social security; $13.19 medicare; $24.74 state tax; and $360.71 health insurance. The net pay totaled $301.74. Golubic explained that this pay included an "extra withdrawal" for health insurance, stating that he pays the health insurance in advance, which, for this particular paycheck included the premium payment for October and the last week of September.

{¶5} Golubic testified that it is the company's policy that employees must return their uniforms. He stated that approximately one month after Hudak's last day, Hudak returned some but "not nearly the amount he was originally given." He conceded that Hudak left two cement floats at the shop that are valued at approximately $20.

{¶6} The court ordered judgment in favor of Hudak for $321.74, plus interest from January 8, 2018. The court's entry stated as follows:

> The defendant admitted that [he] owed the plaintiff his last paycheck for 35 hours at $26 per hour, or $910. He also testified the "concrete floats" were worth $20, which essentially was verified by the plaintiff. The court reviewed the deductions from the plaintiff's last paycheck for taxes, medicare, social security, and health insurance and finds them all to be proper and reasonable.
>
> As to the loss of work claimed by the plaintiff, there was absolutely no evidence to support those claims.

{¶7} Hudak now appeals, alleging that the court erred (1) in failing to apply the Fair Labor Standards Act ("FLSA"), the Ohio Minimum Fair Wage Standards Act ("OMFWSA"), the Ohio Constitution, and Ohio's Prompt Pay Act, and not awarding statutory damages; and (2) by allowing deductions prohibited by 29 C.F.R. 3.5(d)(2)(I) and R.C. 4113.15.

{¶8} We review small claims proceedings for an abuse of discretion. *Gibson v. Shephard*, 2017-Ohio-1157, 87 N.E.3d 846, ¶ 19 (8th Dist.). Under this standard, the trial court's decision will be reversed only if it is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). A decision is unreasonable "'if there is no sound reasoning process that would support that decision.'" *Ockunzzi v. Smith*, 8th Dist. Cuyahoga No. 102347, 2015-Ohio-2708, ¶ 9, quoting *AAAA Ents. Inc. v. River Place Community Urban Redevelopment*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶9} Both federal and Ohio law authorize an employee to recover the amount of unpaid wages, an additional equal amount as liquidated damages, attorney fees, and costs. The federal FLSA "requires employers to pay employees engaged in commerce a wage consistent with the minimum wage established by the Act." *Ellington v. E. Cleveland*, 689 F.3d 549, 553 (6th

Cir.2012), citing 29 U.S.C. 206(a). In addition to any judgment awarded, an employee can recover liquidated damages, attorney fees, and costs for an employer's violation of the FLSA. *See* 29 U.S.C. 216(b).

{¶10} Similarly, Ohio's minimum wage laws impose a duty upon employers to pay employees the minimum wage. *See* Ohio Constitution, Article II, Section 34a (the Fair Minimum Wage Amendment mandating state minimum wage) and R.C. 4111.14 (Ohio's fair minimum wage law, OMFWSA, enacted to implement the provisions of Article II, Section 34a); *see also Haight v. Minchak*, 146 Ohio St.3d 481, 2016-Ohio-1053, 58 N.E.3d 1135, ¶ 12 ("The Fair Minimum Wage Amendment incorporates the FLSA without any limitation."). And R.C. 4111.10 allows for the recovery of costs and attorney fees to a prevailing employee where an employer has not paid the applicable minimum wage.

{¶11} Additionally, Ohio's Prompt Pay Act, codified in R.C. 4113.15, provides a time limit within which an employee must receive any wages earned. The statute provides that every employer shall "on or before the first day of each month, pay all its employees the wages earned by them during the first half of the preceding month ending with the fifteenth day thereof, and shall, on or before the fifteenth day of each month, pay such employees the wages earned by them during the last half of the preceding calendar month." R.C. 4113.15(A). Moreover, when wages are 30 days past due, the employer is liable for liquidated damages in the amount due plus 6% or $200, whichever is greater. R.C. 4113.15(B).

{¶12} Hudak argues on appeal that the trial court erred in failing to award liquidated damages and attorney fees mandated by the above enumerated federal and Ohio laws. However, upon review of the record, we find Hudak failed to request these statutory damages in

his complaint, present evidence in support of these damages at trial, or ask the trial court to award these damages at trial.

{¶13} We recognize that the rules of civil procedure are "relaxed" in small claims actions. *Gibson*, 2017-Ohio-1157, 87 N.E.3d 846, at ¶ 38. "The legislative intent in establishing the small claims court division was clearly not to require plaintiffs to file complaints similar to those filed by licensed attorneys." *Wagner v. Dambrosio*, 8th Dist. Cuyahoga No. 52142, 1986 Ohio App. LEXIS 8976, 3 (Nov. 6, 1986), citing R.C. 1925.04.

{¶14} However, an individual who files a small claims complaint must set forth the amount and nature of his claim in a concise, nontechnical form. *Campbell v. Union Twp. Serv. Dept.*, 141 Ohio Misc.2d 15, 2005-Ohio-7162, 868 N.E.2d 289, citing R.C. 1925.04(B). Damages "cannot be based on mere speculation and conjecture." *Gibson* at ¶ 31, citing *Kavalec v. Ohio Express, Inc.*, 2016-Ohio-5925, 71 N.E.3d 660, ¶ 37 (8th Dist.). Nor can damages be based upon a "guesstimate." *Kavalec* at ¶ 37.

{¶15} Moreover, Civ.R. 8(A), which is applicable to small claims actions, requires the pleading contain a "demand for judgment for the relief to which the party claims to be entitled." *Justice v. Lerner*, 7th Dist. Mahoning No. 03 MA 69, 2003-Ohio-7022, ¶ 12. In *Justice*, the court determined that Civ.R. 1(C) "renders Civ.R. 8(A) applicable to a small claims matter" because R.C. 1925.04, which requires a party to request the damages to which it claims it is entitled, "is not inapposite to Civ.R. 8(A)." *Id.* In so concluding, the court declined to consider the appellant's request for treble damages on appeal where she failed to specifically request such damages under the Consumer Sales Practice Act in her pleading. *Id.*

{¶16} Further, it is well settled in Ohio law that a party cannot raise new issues or legal theories for the first time on appeal. *See In re M.D.*, 38 Ohio St.3d 149, 151, 527 N.E.2d 286

(1988); *Mosley v. Cuyahoga Cty. Bd. of Mental Retardation*, 8th Dist. Cuyahoga No. 96070, 2011-Ohio-3072, ¶ 55. Reviewing courts are not required to consider claims the plaintiff failed to raise in the trial court. *Thomas v. Univ. Hosps. of Cleveland*, 8th Dist. Cuyahoga No. 90550, 2008-Ohio-6471, ¶ 37. "Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed." *Id.* Moreover, "[a]lthough 'parties are given a greater degree of latitude consistent with the purpose behind small claims actions[,]' * * * they are not permitted to ignore established principles of appellate review." *Lovas v. Mullett*, 11th Dist. Geauga No. 2000-G-2289, 2001 Ohio App. LEXIS 2951, 8-9 (June 29, 2001), quoting *Karnofel v. Watson*, 11th Dist. Trumbull No. 99-T-0052, 2000 Ohio App. LEXIS 2770, 5 (June 23, 2000). And where a party fails to request statutory damages in his pleading at the trial court, he has waived the issue for purposes of the appeal. *Justice*.

{¶17} Here, Hudak claims damages in the amount of $3,600 and states generally in his complaint that he "believes" he is "protected under the [FLSA]." This vague statement, however, is not a request for statutory or liquidated damages or attorney fees. Moreover, during trial, the court asked Hudak to explain the relief he sought. In response, Hudak identified the $910 for his last paycheck, the value of his tools, and the opportunity to "make $250 to $300 a day." At no point did he request statutory damages, liquidated damages, or attorney fees. Because he did not request that these damages be awarded at trial, he is precluded from seeking them for the first time on appeal.

{¶18} Hudak also contends that the trial court erred in allowing Golubic to deduct the cost of health insurance from his last paycheck, arguing that 29 C.F.R. 3.5(d)(2)(I) and R.C. 4113.15 prohibit an employer from deducting the cost of medical benefits without prior written

consent. And because he did not consent to the deduction in writing, Hudak asserts, Golubic improperly withheld the cost of health insurance from his last paycheck.

{¶19} R.C. 4113.15 requires employers to disburse their employees' wages, less certain deductions, at regular intervals. Allowable deductions include federal, state, and local taxes, as well as "deductions made pursuant to a written agreement for the purpose of providing the employee with any fringe benefits." R.C. 4113.15(D)(1). Health benefits are considered a "fringe benefit." R.C. 4113.15(D)(2); *Oil Chem. & Atomic Workers Internatl. Union, Local Union No. 3-689 v. Martin Marietta Energy Sys.*, 97 Ohio App.3d 364, 370, 646 N.E.2d 883 (4th Dist.1994)("Health care benefits are clearly an allowable deduction under [R.C. 4113.15]."). Similarly, 29 C.F.R. 3.5(d)(2)(I) permits payroll deductions for health benefits "[v]oluntarily consented to by the employee in writing."

{¶20} Here, although Hudak did not claim at trial that he never consented to healthcare deductions in writing, he clearly objected to the deduction made by Golubic, asserting that Golubic "is [not] allowed to make deductions on his own rather than state, federal, and local taxes * * * [a]nd if he thought I owed him money for health insurance at the time he fired me he could have contacted me to work out an arrangement to cancel the health insurance and that never happened."

{¶21} Golubic conceded in his brief on appeal that Hudak was entitled to health insurance as a benefit of employment "only as long as he worked for appellees," and he conceded that Hudak's last day of employment was September 26, 2017. Yet at trial, Golubic testified that he deducted $360.71 for healthcare from Hudak's paycheck to pay for Hudak's health insurance for the last week of September and the month of October. It is undisputed that Hudak was not employed by Golubic in October and at least part of the last week of September. Golubic

claimed that he pays for health insurance in advance, which is why he deducted health insurance from Hudak's pay for the last week of September and the month of October. However, if Golubic pays in advance monthly, the last week in September should have already been paid.

{¶22} Moreover, Hudak testified that he received a bill for health insurance in the mail two days after he was terminated. Although Golubic stated that the bill was likely for the month of November, the fact that Hudak received this bill only days after he was terminated — which was still in the month of September — demonstrates that Golubic deducted health insurance from Hudak's paycheck when Hudak was not an employee entitled to receiving this benefit. We therefore find that Golubic's deduction from Hudak's paycheck for health insurance for the last week in September and the month of October was improper.

{¶23} In light of the record before us, we must find the trial court abused its discretion in finding the deduction of $360.71 for health insurance was "proper and reasonable." We therefore reverse the trial court to the extent it found the employer's deduction for health insurance "proper and reasonable," and we remand for the trial court to order that Hudak should be reimbursed for the improper deduction.

{¶24} Hudak's assignments of error as they pertain to statutory damages are overruled. His assignment of error concerning the trial court's improper allowance of a deduction for healthcare is sustained.

{¶25} Judgment affirmed in part and reversed in part; case remanded.

It is ordered that appellant recover of appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the municipal court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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TIM McCORMACK, PRESIDING JUDGE

ANITA LASTER MAYS, J., and
KATHLEEN ANN KEOUGH, J., CONCUR