COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP340-FT **Cir. Ct. No. 2003SC1206**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

JANET STEINBRUNER,

PLAINTIFF-RESPONDENT,

V.

THE MCCLONE AGENCY, INC. AND MICHAEL MCCLONE,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed and remanded*.

¶1 NETTESHEIM, J.[1] The McClone Agency and Michael McClone (McClone) appeal from a small claims judgment awarding damages to Janet

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Steinbruner, a former employee, based on McClone's failure to timely pay wages pursuant to WIS. STAT. § 109.03(2). We affirm the judgment. We remand for a determination of Steinbruner's attorney fees related to this appeal.

BACKGROUND

¶2 McClone, an insurance agency, hired Steinbruner in July 2002 as a salesperson. The parties' oral arrangement was that McClone would train Steinbruner at its Menasha office and, following the training, Steinbruner would move to Waukesha and operate a sales office out of her home. McClone would pay Steinbruner a biweekly salary in the gross amount of $1269.23. From this amount, McClone would deduct federal and state income tax withholding, FICA, Medicare, and insurance premiums. This resulted in a net wage to Steinbruner of $911.90.

¶3 Pursuant to the parties' arrangement, McClone trained Steinbruner in basic underwriting skills at its office in Menasha from July through October 2002, and Steinbruner then transferred to Waukesha. The parties presented conflicting evidence regarding their arrangement as to the equipment to be used by Steinbruner and the servicing of that equipment. Steinbruner initially understood that McClone would provide her a computer, fax machine, telephone line, Internet connection, and cellular phone access, while Steinbruner would pick up the cost of the physical cell phone and any related accessories. Later, a dispute arose as to whether McClone was responsible only for the basic monthly cell phone charge or the additional "overage" charges. According to Steinbruner's testimony, a subsequent conversation with Ken Rossi, McClone's sales manager, resulted in an understanding that McClone would pay the costs of the Internet and cell phone service, which were being billed to McClone, and Steinbruner would bear the cost

of a computer, a land line, and a fax machine. Rossi, however, denied that he and Steinbruner reached such an understanding during their conversation. Michael McClone, the company president, testified that McClone was responsible for only the first $50 of the cell phone charge.

¶4 On February 21, 2003, Steinbruner presented McClone with a letter of resignation. In this letter, Steinbruner agreed that McClone could deduct the expenses related to her training and licensing from the wages due her. In addition, Steinbruner also agreed to pay for the February cable bill for the Internet connection to her home office in exchange for McClone paying the March cellular telephone bill. The parties agree that the amount relating to Steinbruner's training and licensing is $673 and the amount of the cable bill is $47.24.

¶5 Steinbruner's final paycheck was due on February 26. However, McClone never issued the paycheck because it charged Steinbruner with additional expenses beyond those agreed to by Steinbruner in her resignation letter. These additional expenses included the cable bill, the cellular expenses and an anticipated cellular cancellation fee. Under McClone's computation, after crediting Steinbruner with the salary owed, Steinbruner owed McClone $210.89, rather than McClone owing Steinbruner any wages.

¶6 Steinbruner sued McClone under WIS. STAT. § 109.03(2), which governs the payment of wages to a discharged or resigned employee who does not have a written contract with the employer. This statute requires that an employee be "paid in full" no later than the date that the employee would have been regularly paid. The matter was tried to the court without a jury.

¶7 In determining whether McClone had violated the statute, the trial court computed Steinbruner's damages on the basis of Steinbruner's gross wage of

$1269.23, not her net wage of $911.90. The court did so because Steinbruner had not issued any paycheck to Steinbruner for the wage period in question and because the evidence otherwise did not establish that McClone had withheld the required state and federal taxes and social security taxes. Working off of Steinbruner's gross wage, the court added $89.90, which represented a payment previously made by Steinbruner to McClone for telephone expenses. The court then deducted the educational and training expenses ($673) and the cable bill ($47.24), as conceded by Steinbruner in her letter of resignation. The court also deducted cell phone charges of $238.50. This resulted in net unpaid wages due Steinbruner in the amount of $400.39, to which the court added fifty percent of those wages as the penalty permitted by WIS. STAT. § 109.11(2)(a). In addition, the court awarded Steinbruner her reasonable attorney fees pursuant to WIS. STAT. § 109.03(6).

¶8 McClone moved for reconsideration, renewing its argument that the trial court should have computed Steinbruner's damages on the basis of her net wage. In support, McClone submitted an affidavit stating that the required withholding payments had been paid. The trial court denied the motion, stating that McClone had "ample opportunity" to present this evidence at the trial. The court also harkened back to its ruling at the time of trial that McClone had not issued Steinbruner any paycheck for the period in question and that there otherwise was no evidence that McClone had paid the required withholding taxes. McClone appeals.

DISCUSSION

¶8 Before we address the merits, we make two observations. First, McClone does not appeal the trial court's denial of its post trial motion to reopen

the evidence. Instead, McClone's appeal is taken from the judgment resulting from the bench trial.

¶9 Second, this is our second opinion in this case. In our original opinion, we held that the trial court had erred by measuring Steinbruner's damages from her gross wage. We so held based on the fact that Steinbruner's original complaint sought damages based on her net wage. However, in a motion for reconsideration to this court, Steinbruner correctly noted that she had filed an amended complaint asking that her damages be computed on the basis of her gross wage.[2] In addition, we take note that the parties' trial court briefs following the close of the evidence acknowledged Steinbruner's damage request based on her gross wage. Nonetheless, McClone argued that the court should compute any damages on the basis of Steinbruner's net wage. Learning of this additional history, we withdrew our original opinion.[3]

¶10 We now turn to the merits. We begin with the parties' disagreement as to whether WIS. STAT. § 109.03(2) permits an employer and employee to enter into an agreement allowing for deductions from wages beyond those required by law. Steinbruner argues that § 109.03(5) prohibits such agreements. This statute states, in relevant part, "Except as provided in sub. (1), no employer may by special contract with employees or by any other means secure exemption from this section." In response, McClone relies on ***Heder v. City of Two Rivers***, 295 F.3d 777 (7th Cir. 2002), which holds that § 109.03(2) "does not prevent employees

[2] McClone also filed a motion for reconsideration.

[3] Although the error was ours, we observe that it could have been avoided had the parties noted and cited to this history of the case in their appellate briefs, especially in light of the "gross wage/net wage" dispute between the parties.

from striking agreements that reduce what 'in full' means." ***Heder***, 295 F.3d at 783.

¶11 We agree with the rationale of ***Heder*** that WIS. STAT. § 109.03(2) does not bar an employer and employee from making an agreement permitting the employer to make additional deductions from gross wages beyond those mandated by law. The clear language of the statute reveals its purpose—to assure that the discharged or resigned employee is paid in full in a timely manner. Steinbruner offers no logical reason or public policy argument (and we can think of none) as to why this statute should be read to bar an employer and employee from entering into an agreement that permits additional deductions *so long as: (1) the net amount paid to the employee represents full payment after the agreed-to deductions are made, and (2) the payment is timely made*. As ***Heder*** sensibly teaches, the parties should be free to contract as to "what 'in full' means." ***Heder*** 295 F.3d at 783.[4] The trial court also recognized that these kinds of agreements are commonplace.

¶12 Having upheld the parties' right to make such an agreement, we next attempt to discern what the agreement was in this case. This is difficult because, as WIS. STAT. § 109.03(2) envisions, we do not have the benefit of a formal written contract. And, as our recital of the facts reveals, except for the wage

[4] Although we agree with McClone that an employer and employee are permitted to agree on wage deductions beyond those mandated by law, we reject McClone's reliance on WIS. STAT. § 103.455 as further support for this argument. This statute forbids an employer from making any wage deduction "for defective or faulty workmanship, lost or stolen property or damage to property, unless the employee authorizes the employer in writing to make that deduction…." We fail to see how this statute, which is targeted at wage deductions for defective or faulty workmanship or the loss or damage to property, bears on the facts of the instant case, which deals with a wholly different category of deductions agreed to by the parties.

deductions mandated by law and some further deductions authorized by Steinbruner in her resignation letter, the evidence fails to show any concrete meeting of the minds as to the further deductions at dispute in this case. At most, the evidence reveals that the parties' positions on these matters kept evolving as the events unfolded. Given that murky history, we cannot say that any of the trial court's factual findings rejecting McClone's claims for expenses beyond those plainly documented in the evidence are clearly erroneous. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." WIS. STAT. § 805.17(2).

¶13 In her letter of resignation, Steinbruner acknowledged that McClone was entitled to deduct her training and education expenses of $673 from her final paycheck. Thus, McClone was well within its rights to deduct this item from Steinbruner's wages and the trial court properly so ruled. Steinbruner's letter also acknowledged her responsibility for a cable bill of $47. While the letter does not expressly authorize McClone to deduct this charge from her wages, she makes no complaint that the trial court treated the letter as such authorization. Nor does Steinbruner make any complaint about the other deductions the trial court made, even though they were not alluded to in her resignation letter.

¶14 In arguing that Steinbruner was owed no wages when she resigned, McClone relies on additional expenses that McClone claims are owed by Steinbruner. However, as we have noted, the evidence does not show any meeting of the parties' minds as to these additional claims. We also note that as of February 26, 2003, the date when Steinbruner's final paycheck was due, these additional expenses were not yet owed, not yet billed, or otherwise later incurred. Michael McClone admitted as much with regard to certain of these expenses in his

cross-examination, and the trial court noted this fact in rejecting McClone's argument that it was entitled to deduct these projected expenses from the wages due Steinbruner.

¶15 The clear purpose of WIS. STAT. § 109.03(2) is to assure that an employee who has resigned or been discharged is paid in full in a timely manner. This purpose is not served if the employer is permitted to deduct anticipated future expenses from wages that are then due and owing. The same is true as to expenses that are not underpinned by a meeting of the parties' minds as of the time the wages are due. Thus, the projected expenses claimed by McClone were improper deductions from Steinbruner's wages under § 109.03(2). This is not to say that Steinbruner is not liable for these additional expenses. She may well be. But McClone's ability to collect for those expenses rests on its standing as an ordinary creditor, not as an employer under § 109.03(2). *See* ***Heder***, 295 F.3d at 779.

¶16 That brings us to the question of whether the trial court correctly started its computation from Steinbruner's gross wage instead of her net wage. The court held that Steinbruner's gross wage was the proper starting point because McClone had not presented any evidence showing that it had made the requisite withholding payments for Steinbruner's final pay period. We agree.

¶17 True, Steinbruner's original complaint sought damages measured on the basis of her net wage. However, she later filed an amended complaint, which asked that her damages be measured on the basis of her gross wage. In addition, her written brief to the trial court at the close of the evidence made a similar request. McClone's brief acknowledged Steinbruner's reliance on her gross wage, but argued that any damages should be measured on the basis of her net wage.

¶18 In its response to Steinbruner's motion for reconsideration of our original opinion, McClone points to an affidavit that it tendered in support of its trial court motion to reopen the evidence. This affidavit stated that McClone had paid the required withheld taxes. However, the trial court denied the motion to reopen the evidence, and, as noted, McClone has not appealed from this ruling. As such, our consideration of this issue is properly limited to the evidence presented at the trial, not the putative evidence submitted by McClone in support of its motion to reopen the evidence. And, as we have noted, the evidence at the trial does not show that McClone made those withholding payments.

¶19 Nor would it be proper to charge Steinbruner for this lack of evidence as McClone contends. Steinbruner's theory of prosecution was that her damages should be computed on the basis of her gross wage. McClone's theory of defense was that Steinbruner's damages should be computed on the basis of her net wage, although it submitted no evidence showing that it had made the requisite tax withholding payments. McClone's argument would have us obligate Steinbruner to prove McClone's theory of defense. We decline.

¶20 McClone also challenges the trial court's crediting Steinbruner with the $89.80 payment by check she had made to McClone for telephone expenses. Because McClone had never presented the check for payment, McClone argues that it properly deducted this expense from the final wages owed to Steinbruner. However, McClone still possessed the check at the time of the trial court proceedings. Since the possibility existed that McClone might present the check for payment in the future, we see no error in the trial court's crediting Steinbruner with this amount.

¶21 McClone, however, argues that we should judicially notice that if it presented Steinbruner's check for payment at this late date, the check would not be honored because it is too stale.[5] We first observe that McClone does not cite to any portion of the record where it made this argument in the trial court. Thus, the argument is waived. Second, we reject the argument on the merits. A fact presented for judicial notice must not be subject to reasonable dispute, in that it must be reasonably known, or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. WIS. STAT. § 902.01(2)(a) and (b). Assuming arguendo that most financial institutions would decline to honor Steinbruner's check because of its vintage, we are not prepared to say that such would inevitably happen in all instances. In short, whether the check would be honored is subject to reasonable dispute. We reject McClone's judicial notice argument.

CONCLUSION

¶22 We affirm the judgment. Since Steinbruner has prevailed on this appeal, she is entitled to her reasonable attorney fees related to this appeal pursuant to WIS. STAT. § 109.03(6). We remand for that determination.

By the Court.—Judgment affirmed and remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[5] McClone makes this argument to us in its motion for reconsideration.