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**IN THE
COURT OF APPEALS OF INDIANA**

LARRY E. WEBB CONSTRUCTION CO., INC.,)
and ECLIPSE CHARTERS & TOURS, LLC,)

Appellants-Defendants,)

vs.)

THERESA BURNS,)

Appellee-Plaintiff.)

No. 45A04-1011-PL-685

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Julie N. Cantrell, Judge
Michael N. Pagano, Magistrate
Cause No. 45D09-0904-PL-67

April 4, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellants-defendants Larry E. Webb Construction Co., Inc. (Webb Construction), and Eclipse Charters & Tours, LLC (Eclipse) (collectively, the Appellants), appeal the trial court's orders granting summary judgment on appellee-plaintiff Theresa Burns's claim under the Indiana Wage Payment Act¹ and awarding her damages in the amount of \$6958.35. The Appellants raise a number of arguments, two of which are dispositive: (1) the order is erroneous with respect to Eclipse because Eclipse did not exist at the time Burns was employed by Webb Construction and, consequently, was never Burns's employer; and (2) there are issues of material fact relating to the amount of wages to which Burns is entitled, if any. Additionally, the Appellants contend that the trial court erred by awarding Burns attorney fees in the amount of \$24,687.32.

We find that the order was erroneous with respect to Eclipse, which did not exist during the timeframe for which Burns is trying to recover wages. We also find that there are issues of fact with respect to Webb Construction that render summary judgment inappropriate. Thus, we reverse and remand with instructions to enter an order granting summary judgment in favor of Eclipse and proceed to trial regarding the claims against Webb Construction and, following trial, recalculate the amount of attorney fees, if any, to which Burns is entitled.

¹ Ind. Code § 22-2-5-1 et seq.

FACTS

Webb Construction is a general contractor, and beginning in 2000, it became registered to do business as Eclipse Charters & Tours. From that point forward, Webb Construction operated a tour bus business in addition to its general contractor business. Larry E. Webb (Larry) was the president of Webb Construction, and Burns reported to him.

Burns began working for Webb Construction as a school bus driver in 2006. At some point, she began to drive tour buses for the company. As a tour bus driver, she was paid \$150 per trip, or \$150 per day if the trip lasted for more than one day. Her responsibilities included documenting a pre-trip inspection of the tour bus, keeping a trip log, reporting any problems to Larry, and personally meeting with Larry after each trip to discuss the trip, advise him of any significant occurrences, and deliver to him the relevant documents.

Burns quit her job with Webb Construction on July 31, 2007. On August 23, 2007, Burns filed a complaint against the Appellants, alleging that she was entitled to unpaid wages, treble damages, and attorney fees pursuant to the Wage Payment Act. Burns sought unpaid wages from a number of trips she made for Webb Construction.

Burns alleges that she drove a charter trip to Georgia in April 2007 and that she was paid only \$1040 for that trip rather than the \$1709.45 to which she believes she is entitled. Additionally, Burns states that Webb Construction asked her to drive for the Fourth of July parade in Gary and that she was never paid the \$150 she was owed for her

work that day. The Appellants claim that Burns acted in a volunteer capacity on that occasion.

In July 2007, Burns was a co-driver on a trip to Georgia. During the trip, Burns allegedly wrecked the bus, causing approximately \$6000 in damage, and then abandoned it. Thereafter, she refused to meet with Larry to discuss the trip and provide him with the relevant paperwork, including the accident report. Larry never received an accident report from Burns. Burns was never paid for the July 2007 trip. Webb Construction alleges that she was not paid because she failed to prepare the proper paperwork, to meet with Larry afterwards, and to give him the accident report.

Also in July 2007, Burns was a driver on a trip to Orlando. Larry is not certain whether Burns was paid for that trip, though he believes she was. But the Appellants contend that Burns is not entitled to full compensation for that trip because she failed to complete all of her job responsibilities surrounding the trip.

On July 30, 2007, Webb Construction contacted Burns to do an emergency run on the charter bus because of a problem with Amtrak. Burns claims that the company promised to pay her \$300 for each emergency run, plus an additional \$150 for runs that required an overnight stay. The Appellants, however, argue that there was no special emergency pay and that, instead, the pay was her normal rate—\$150 per day.

Based on all of the above instances, Burns alleges that she is owed \$2,604.45 in unpaid wages, plus damages.

On November 23, 2009, Eclipse filed a motion for summary judgment, arguing that it was created in 2008—nearly eight months after Burns’s employment with Webb Construction had ceased. On April 30, 2010, Burns filed a cross-motion for summary judgment against both defendants on her claims for unpaid wages, treble damages, and attorney fees. The Appellants moved to strike three affidavits filed by Burns in support of her summary judgment motion: Burns’s own affidavit, which bore only an electronic signature, and two others. The trial court granted the motion with respect to the other affidavits but denied it with respect to Burns’s, finding that the electronic signature on the document “is sufficient.” Appellants’ App. p. 7.

On July 6, 2010, the trial court issued an order denying Eclipse’s motion for summary judgment and granting Burns’s motion for summary judgment against both Webb Construction and Eclipse. Among other things, the trial court found as follows:

As to the issue of the correct party Defendant, the court is satisfied that their [sic] remain material facts in dispute regarding whether one or both of the Defendants may be liable to plaintiff. Specifically, [Webb Construction] was doing business as Eclipse Charters & Tours during Plaintiffs [sic] employment. After her employment ceased, [Eclipse] became a separate entity, an LLC.

Plaintiff is correct that [Eclipse] may be the successor business to Webb Construction[. . . . Both entities shall remain Defendants in this case at this time. . . .

. . . Defendants urge that [Burns] did not complete the necessary logbooks for the Orlando trip, for which [Burns] claims she is owed \$1050.00. Taking Defendants’ assertion as true, the court concludes it remained illegal for Defendants to withhold Plaintiffs [sic] pay. Surely, Defendants could terminate [Burns] for this conduct, but this

remains insufficient legal justification to withhold Plaintiffs' [sic] pay. . . . [T]here is no indication that such a failure on the part of [Burns] would have prevented [Webb Construction] from ascertaining that which [Burns] was owed

. . . Defendants assert that [Burns] is not entitled to payment for the Fourth of July trip as she volunteered for this activity. However, the court is satisfied that the law provided by [Burns] as to the legality of such a stance forecloses Defendants' argument.

Id. at 7-9. The trial court awarded Burns \$2319.45 for her unpaid wages, plus statutory damages in the amount of \$4638.90. The trial court also awarded Burns attorney fees, and later calculated that she was owed fees in the amount of \$24,687.32. The Appellants now appeal.

DISCUSSION AND DECISION²

I. Standard of Review

Summary judgment is appropriate only if the pleadings and evidence considered by the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 909 (Ind. 2001); see also Ind. Trial Rule 56(C). On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Owens Corning, 754 N.E.2d at 909. Additionally, all facts and reasonable inferences from those facts are construed in favor of the nonmoving

² Burns argues that this appeal should be dismissed as untimely because the Appellants waited to file the notice of appeal until after the attorney fees had been calculated, which was more than thirty days after the July 6, 2010, order was entered. But our motions panel has already denied Burns's motion to dismiss, and we decline to revisit the issue herein.

party. Id. If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper. Id.

II. Eclipse

First, we will consider whether the trial court properly denied Eclipse's summary judgment motion. It is undisputed that Webb was never employed by Eclipse and that Eclipse did not come into existence until eight months after Burns's employment with Webb Construction ceased. The fact that Webb Construction did business as Eclipse Charters & Tours is of no moment, inasmuch as the legal entity who employed Burns was Webb Construction. Eclipse—the LLC—was not created until 2008.

Notwithstanding these undisputed facts, Burns argues, and the trial court agreed, that Eclipse is a proper party herein pursuant to successor liability. Successor liability attaches when (1) the purchasing entity is a bona fide purchaser; (2) the purchasing entity had notice of the potential liability; and (3) the selling entity is unable to provide adequate relief directly. Equal Employment Opportunity Comm'n v. SWP, Inc., 153 F. Supp. 2d 911, 917 (N.D. Ind. 2001).

There is no evidence that Eclipse was a purchasing entity or that Webb Construction was a selling entity. The record herein establishes that Webb Construction does not own or control Eclipse—indeed, there is no evidence tending to establish that they are related in any way aside from the fact that Larry owns both entities. There is no designated evidence establishing that Eclipse received any assets from Webb Construction. Finally, it is undisputed that Webb Construction is still in business, has

substantial assets, and is in good standing. Under these circumstances, the trial court erred by concluding that successor liability attaches to Eclipse. Consequently, we reverse and remand with directions that summary judgment be entered in Eclipse's favor.

III. Webb Construction

Webb Construction contends that summary judgment was improperly entered in Burns's favor because there are multiple issues of fact. The Wage Payment Act "requires employers to 'pay each employee at least semimonthly or bi-weekly, if requested, the amount due the employee.'" David A. Ryker Painting Co. v. Nunamaker, 849 N.E.2d 1116, 1118 (Ind. 2006) (quoting I.C. § 22-2-5-1(a)) (emphasis original).

Here, the parties dispute the following facts:

- Was Burns entitled to her full daily pay just for driving the bus? Or was she also required to fulfill other duties, including paperwork and post-trip meetings with Larry, to be entitled to her wages?
- If she was required to fulfill other duties, did she, in fact, fulfill all of those duties with respect to the disputed drives outlined above?
- If she completes some of her duties, but not all, is she entitled to a portion of her wages? If so, how much?
- Was Burns promised an "emergency bonus" for the work she did on July 30, 2007, or was she merely entitled to her regular \$150/day wage?
- Did Burns volunteer for the Fourth of July parade, or was she working with the expectation of receiving a wage that day?

All of these issues of fact are relevant to whether Burns was actually entitled to receive wages for the incidents in question and, if she was entitled to receive wages, whether she

was entitled to receive the full amount or merely a portion thereof. These multiple issues of fact necessarily mean that summary judgment is inappropriate with respect to Webb Construction. Consequently, we reverse and remand for trial.³

The judgment of the trial court is reversed and remanded with instructions to enter an order granting summary judgment in favor of Eclipse, proceed to trial with respect to the claims against Webb Construction, and, following trial, recalculate the amount of liquidated damages and attorney fees, if any, to which Burns is entitled.

MAY, J., and BRADFORD, J., concur.

³ The Appellants also make a compelling argument that Burns's affidavit should have been stricken because it bears only an electronic signature rather than her actual signature. We need not decide this issue and decline to do so at this time, but caution attorneys that by far the best practice is to obtain an actual signature from affiants rather than attempting to rely on an electronic signature.