STATE OF MICHIGAN

COURT OF APPEALS

LETICA CORPORATION,

Plaintiff/Counter Defendant-Appellee,

v

COREY DEMERITT,

Defendant/Counter Plaintiff-Appellant.

UNPUBLISHED
August 20, 2020

No. 349329
Oakland Circuit Court
LC No. 2018-162995-CB

Before: RONAYNE KRAUSE, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting summary disposition under MCR 2.116(C)(10) in favor of plaintiff. Defendant was an employee of plaintiff, and upon his voluntary resignation, a dispute ensued as to the amount of defendant's entitlement to payment for accumulated unused vacation time and sick time. Defendant argues that the trial court erred by misapplying Indiana law when assessing his claims. Defendant also argues that the trial court erred when it found that defendant's deposition testimony precluded recovery of additional vacation time and sick time. We conclude the trial court did not err when it granted summary disposition in plaintiff's favor; therefore, we affirm.

I. BACKGROUND

Defendant was hired as an hourly employee by defendant Letica Corporation in 2001. Although Letica is registered and headquartered in Michigan, defendant worked at a facility in Indiana. Thus, the parties agree that Indiana law applies. However, when defendant was promoted to a salaried position in 2006, the parties executed an employment agreement that Michigan courts would have jurisdiction over any dispute as to their agreement. Apparently, there was no written policy or agreement regarding the determination of wages or the accrual of leave time. However, plaintiff had an unwritten policy that salaried employees like defendant accrued 40 hours of sick time and 160 hours of vacation time on the employee's anniversary date. Plaintiff did not require medical proof of illness to utilize sick time. Plaintiff alleged that it also had a "use it or lose it" policy for vacation time, which defendant disputes.

Defendant voluntarily resigned from plaintiff's employment on August 18, 2017, effective August 30, 2017. Defendant's anniversary date was August 15. Plaintiff paid defendant for 7 hours of unused vacation time, representing a pro-rata accumulation from his anniversary date to his resignation. Defendant, through counsel, sent a demand to plaintiff for payment of "accrued four weeks of vacation, totaling $3,426.15" and attorney fees in the amount of $6,000.00, with the implicit threat of litigation. Plaintiff thereafter tendered a check to defendant representing 153 hours of vacation time. Defendant did not cash the check from plaintiff, leading plaintiff to file suit for declaratory judgment. Defendant answered and filed a counterclaim against plaintiff, seeking damages and attorney fees under Indiana law. The parties subsequently filed cross motions for summary disposition. Concluding that defendant was not entitled to damages or attorney fees under Indiana law because defendant was paid all that he was owed, the trial court granted summary disposition in plaintiff's favor. This appeal followed.

II. STANDARD OF REVIEW

"Appellate review of the grant or denial of a summary-disposition motion is de novo, and the court views the evidence in the light most favorable to the party opposing the motion." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* at 183. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

Questions of statutory interpretation and application are also reviewed de novo. *Tree City Props LLC v Perkey*, 327 Mich App 244, 247; 933 NW2d 704 (2019). "In reviewing questions of statutory interpretation, [this Court's] purpose is to discern and give effect to the Legislature's intent." *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). "If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Tevis v Amex Assurance Co*, 283 Mich App 76, 81; 770 NW2d 16 (2009). Indiana's rules of statutory construction seemingly permit its courts to inquire into the absurdity of a statute's effects. *State ex rel Hatcher v Lake Superior Court, Room Three*, 500 NE2d 737 (Ind, 1986). However, as with Michigan, Indiana requires unambiguous statutory language to be applied by giving the "plain, ordinary and usual" meaning to words without further "resort to rules of construction." *Clark v Clark*, 971 NE2d 58, 62 (Ind, 2012) (quotation omitted). Thus, Indiana is much like Michigan insofar as statutes should be construed to avoid absurd results to the extent possible, but only where a statute is sufficiently ambiguous that construction is permitted at all. See *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999).

III. UNPAID VACATION TIME

Defendant first argues the trial court erred when it found defendant was precluded from recovering damages or attorney fees because plaintiff paid all amounts it owed to defendant before defendant filed his counterclaim. Defendant asserts that under Indiana law, if wages are not timely paid, as prescribed by law, the party seeking payment is entitled to damages and fees. Under Indiana law, "a vacation with pay is, in effect, additional wages." *Die & Mold, Inc v Western*, 448 NE2d 44, 46 (Ind App, 1983). Thus, "[a]n agreement to give vacation pay to employees made

before they perform their service, and based upon the length of service and time worked is not a gratuity but rather is in the form of compensation for services." *Id.* Thus, defendant argues that because plaintiff did not pay defendant for all of his unused vacation time until months later, he was entitled to damages and fees.

Under Indiana law, "if 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." Ind Code 22-2-5-1(b). "Every such person, firm, corporation, limited liability company, or association who shall fail to make payment of wages to any such employee . . . shall be liable to the employee for the amount of *unpaid wages* . . . " Ind Code 22-2-5-2 (emphasis added). We agree with the trial court and plaintiff that because plaintiff tendered to defendant a check for representing payment for 153 hours, in addition to the 7 hours he had already been paid, there were no "unpaid wages" under Indiana Law.

In *Brown v Butcher & Christian Consulting, Inc*, 87 NE3d 22 (Ind App, 2017), the plaintiff brought a class action complaint alleging that the defendant—his employer—violated Ind Code 22-2-5-1 because it did not pay him according to the frequency required under that statutory section. *Brown*, 87 NE3d at 24. The plaintiff, however, conceded that all payments of his wages were eventually made before his filing of the lawsuit. *Id*. at 25. In concluding that the plaintiff was not entitled to damages or attorney fees, the court first noted that in 2015, the Indiana Legislature amended the wage payment statute to allow recovery of damages and fees only if there were unpaid wages at the time of the lawsuit. *Id*. at 26-27. Thus, the court concluded that the plaintiff was not entitled to damages or fees because there were no unpaid wages at the time the plaintiff filed suit. *Id*. at 28. Here, there is no dispute that plaintiff paid defendant the equivalent of 160 hours of vacation time before defendant filed his counterclaim. Thus, under *Brown*, there were no unpaid wages plaintiff owed to defendant that would trigger the penalty provisions of Ind Code 22-2-5-2.

Defendant argues that *Brown* is inapplicable because the defendant in *Brown* merely made payment slightly outside of the prescribed timing window, whereas plaintiff here made payment months later. Nothing in *Brown* suggests that the length of the delay was relevant, nor did the court appear to rely on whether the delay was *de minimus*. Rather, the court stated,

> While it may be the case that [defendant] occasionally paid [plaintiff]'s wages on a schedule that exceeded the Ten-Day Rule, it is undisputed that [defendant] did, in fact, ultimately pay his wages. We cannot conclude that this scenario equates to the 'unpaid wages' referred to in Section 2; nor can we conclude that [plaintiff] is entitled to maintain a lawsuit 'to recover the amount due to' him, as there is no amount that is, in fact, due. [*Brown*, 87 NE3d at 28.]

Thus, we agree with the trial court that defendant is not entitled to damages or fees because there were no amounts owed to him at the time he filed his counterclaim.

Defendant argues that he was, however, entitled to 167 hours of vacation pay, not 160, so there are in fact outstanding unpaid wages owed to him. If defendant's calculations are accurate, we would agree that defendant would be entitled to damages and fees under Ind Code 22-2-5-2.

Defendant, relying on *Die & Mold*, asserts that between August 15, 2016, and August 15, 2017, he accrued 160 hours to use from August 15, 2017, forward. He asserts that he earned an additional seven hours between August 15, 2017, and his resignation date. However, we find *Die & Mold* distinguishable because the vacation time policy in that case differs significantly from plaintiff's vacation time policy.

In *Die & Mold*, the plaintiff brought suit for nonpayment of unused vacation time. *Die & Mold*, 448 NE2d at 44-45. The defendant had no written policy regarding vacation pay, but asserted that its employees were "eligible for vacation pay after the anniversary date of employment, but acknowledged that exceptions had been made." *Id*. at 45. Notably, no such policy was ever formally communicated to employees, and "[t]here was evidence that employees took vacations prior to their anniversary, and were paid after their anniversary, or at the time." *Id*. The Indiana Court of Appeals upheld the trial court's finding that the defendant simply did not have a vacation time policy. On that basis, it rejected the defendant's argument that when the plaintiff, who had worked for the defendant for 10 years, separated from his employment, he was not entitled to any vacation pay because his separation was before his anniversary date. *Id*. at 46-47. Thus, the court held that, "absent an agreement to the contrary, the [plaintiff] would be entitled to a pro rata share of [the vacation pay] to the time of termination." *Id*. at 48. Thus, *Die & Mold* establishes a default rule in the absence of an actual policy.

Unlike the defendant in *Die & Mold*, plaintiff *did* have a policy, rendering the "default rule" irrelevant. Plaintiff's employees did not accrue vacation time as they worked from one anniversary date to the next. Rather, salaried employees, such as defendant, were allotted all of their vacation time for use in the upcoming year at once, as of each anniversary date. Employees had to "use or lose" their leave time in the allotted year. The policy was the same for employees just starting their employment with plaintiff, except those employees had to first pass a 90-day probationary period before their vacation time was activated. Thus, when defendant crossed his anniversary on August 15, 2017, he was allotted 160 hours of vacation time for use between that date and the next anniversary date. He was, therefore, entitled to payment of 160 hours of vacation time as of the date of his resignation, for which he was paid. However, any vacation time he might not have used before August 15, 2017, was forfeited pursuant to plaintiff's policies. Thus, we find no error in the trial court's determination that defendant was only entitled to 160 hours of unused vacation time as of the date of his resignation, not 167 hours.

IV. UNPAID SICK TIME

Defendant also argues that in addition to unused vacation time, he was entitled to payment for his unused sick time when he resigned from plaintiff's employment. The trial court found that under Indiana law, plaintiff was not obligated to pay for unused sick time when its employees separated from the company. We agree.

Under Indiana law, "sick leave is not a benefit which automatically vests when earned." *Shorter v Sullivan*, 701 NE2d 890, 892 (Ind App, 1998). Thus, "[a]bsent some personnel policy language to the contrary, employees are not entitled to compensation for sick leave which has been accumulated but not used when the employee terminates employment." *Id*. "The determination whether sick leave benefits are wages should be determined on a case-by-case basis." *Schwartz v Gary Community Sch Corp*, 762 NE2d 192, 199 n 2 (Ind App, 2002).

In *Shorter*, the plaintiffs filed suit against the defendant for payment of unused sick time the plaintiffs accumulated before their termination of employment. *Shorter*, 701 NE2d at 891. The defendant had a written policy that sick time was to be used only for illness or injury for "continuity of compensation in times of illness or incapacity." *Id*. Affirming the decision of the trial court finding in favor of the defendant after a bench trial, the court stated:

> There is an obvious difference between accumulated vacation pay and accumulated sick pay. Vacation time can be taken by an employee without any conditions after that benefit is earned. However, an employee may take sick leave only when that employee is ill or meets other conditions. [*Id*. at 892.]

Thus, the court held that unless there was a policy stating that sick leave could be taken without condition, employees are not entitled to be paid for accumulated sick leave upon termination of employment. *Id*.

In *Schwartz*, the defendant had such a policy. There, the defendant had a written policy that upon termination, an employee was entitled to be paid $50 for each day of unused sick days, up to 200 days. *Schwartz*, 762 NE2d at 194-195. In addition, the defendant allowed employees to convert up to 10 vacation days per year into sick days. *Id*. at 198. Although the plaintiff, who resigned from the defendant's employment, was entitled to $5,500 under this policy, the defendant withheld that money as a result of an offset it believed it was owed because the plaintiff did not work for a full three years after returning from sabbatical. *Id*. at 196. Reversing the decision of the trial court applying the offset, the Indiana Court of Appeals rejected the defendant's argument that sick pay was excluded from the definition of "wages" under Ind Code 22-2-5-2. *Id*. at 198. The court held that as a result of the defendant's written policies, there was "no reason . . . to distinguish between the payment of accrued vacation time, earned over time, and the payment of accrued sick pay, likewise accrued over time." *Id*. at 198-199. The court distinguished *Shorter*, finding relevant the fact that the defendant in that case allowed sick time to be used only under certain conditions. *Id*. at 199 n 2.

We agree with the trial court that *Shorter* controls the outcome of this issue. As in *Shorter*, plaintiff's vacation-time and sick-time policies differed significantly. Sick time could only be used under limited circumstances, such as for illness. Unlike the defendant in *Schwartz*, plaintiff did not allow employees to convert vacation time into sick time. Similarly, plaintiff did not have a policy in which it would pay employees for unused sick time when an employee separated from the company, like the defendant in *Schwartz*. The fact that plaintiff operated on an "honor system" that could have been abused by dishonest employees does not meaningfully affect the nature of plaintiff's policy or distinguish it from the policy in *Shorter*. Thus, we conclude that the trial court did not err when it found defendant was not entitled to payment for unused sick time when he resigned.

V. PRECLUSIVE EFFECT OF DEPOSITION TESTIMONY

Defendant's final argument on appeal is that the trial court erred when it found defendant was precluded from seeking more than 160 hours of vacation pay because he admitted during his deposition he was only seeking payment for that time. The trial court held that plaintiff was bound by that sworn response. We agree.

This Court has repeatedly held that statements made by a witness during deposition are binding on that witness. Such a statement is not necessarily always outcome-determinative where there is other conflicting evidence, because a party "is entitled to the benefit of testimony in support of a verdict in his favor despite his expression of an opinion inconsistent therewith." *Ortega v Lenderink*, 382 Mich 218, 223; 169 NW2d 470 (1969). Thus, "[d]eposition testimony damaging to a party's case will not always result in summary judgment." *Barlow v John Crane-Houdaille, Inc*, 191 Mich App 244, 250; 477 NW2d 133 (1991) (quotation omitted). Nevertheless, witnesses are bound by their deposition testimony. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006). Therefore, "when a party makes statements of fact in a 'clear, intelligent, unequivocal' manner, they should be considered as conclusively binding against him in the absence of any explanation or modification, or of a showing of mistake or improvidence." *Barlow*, 191 Mich App at 250 (quotation omitted). Here, there simply is no other evidence from which it might be inferred that defendant's deposition statement was inadvertent or mistaken.

Defendant counters this rule by arguing that his statement was a conclusion of law, not of fact; therefore, the admission is not binding. Defendant is correct that "[s]tipulations of fact are binding, but stipulations of law are not binding." *Staff v Marder*, 242 Mich App 521, 535; 619 NW2d 57 (2000). However, defendant's statement was not a statement of law, but a statement of fact. Defendant was asked during his deposition: "What is your complaint against Letica about?" Defendant responded: "Not receiving my four weeks of vacation pay." This statement by defendant described the factual underpinning to his legal assertion against plaintiff that he did not receive all of the amounts owed to him upon his resignation. In other words, the statement describes the factual circumstances underlying the claim—i.e., how much plaintiff owed defendant—rather than the legal theory forming the basis of the claim—i.e., why plaintiff owed that amount. This admission was, therefore, binding on defendant. See *Casey*, 273 Mich App at 396.

VI. CONCLUSION

Affirmed. Plaintiff, being the prevailing party, may tax costs. MCR 7.219(A).

/s/ Amy Ronayne Krause
/s/ David H. Sawyer
/s/ Mark T. Boonstra