

**NOTICE**

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2014 IL App (4th) 130758-U

NO. 4-13-0758

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

June 25, 2014

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

In re: MARRIAGE OF	)	Appeal from
SUSAN L. PAULEY, n/k/a SUSAN L. VOUGHT,	)	Circuit Court of
Petitioner-Appellant,	)	Macon County
and	)	No. 05D363
LOREN L. PAULEY,	)	
Respondent,	)	
v.	)	Honorable
CATERPILLAR, INC., a Delaware Corporation,	)	William Hugh Finson,
Third-Party Respondent-Appellee.	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.  
Justices Knecht and Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court held the trial court did not err in (1) finding in favor of third-party respondent and (2) denying petitioner's motion to amend the pleadings.

¶ 2 In August 2005, petitioner, Susan L. Pauley, n/k/a Susan L. Vought, filed a petition for dissolution of marriage from respondent, Loren L. Pauley. In October 2006, the trial court entered the judgment for dissolution of marriage. In January 2007, the court entered its order on the remaining issues, including the requirement that Loren pay child support. In November 2009, Susan filed a third-party complaint against third-party respondent, Caterpillar, Inc. (Caterpillar), seeking a money judgment for its failure to withhold the appropriate amount from Loren's paycheck. Following a bench trial in June 2013, the court found in favor of Caterpillar and denied Susan's motion to amend the pleadings.

¶ 3 On appeal, Susan argues the trial court erred in (1) finding in favor of Caterpillar

and (2) denying her leave to amend her complaint. We affirm.

¶ 4

## I. BACKGROUND

¶ 5 Susan and Loren were married in July 1982. The parties had two children during the marriage, Casey and Taylor. In August 2005, Susan filed a petition for dissolution of marriage.

¶ 6 In October 2006, the trial court entered a judgment of dissolution of marriage. The court also entered a joint-parenting agreement, wherein Susan and Loren would share joint custody of Taylor. In January 2007, the court issued its written decision on the remaining issues. Among other things, the court ordered Loren to pay \$260.58 per week in child support, effective January 12, 2007. In February 2007, Loren filed a motion to reconsider, which the court denied.

¶ 7 Loren appealed, arguing the trial court erred in (1) its award of child support to Susan and (2) its order to alternate the income tax dependency exemption between the parties. This court found no abuse of discretion in the court's child support award but modified the judgment of dissolution to award Loren the dependency exemption. *In re Marriage of Pauley*, No. 4-07-0340 (Jan. 9, 2008) (unpublished order under Supreme Court Rule 23).

¶ 8 In July 2007 and February 2008, Loren filed motions to modify child support. In January 2009, the trial court entered an order reducing Loren's child support obligation to \$175 per week. In August 2009, after a hearing on a petition for adjudication of civil contempt, the court entered an order directing Caterpillar to correct its records and deduct \$175 per week from Loren's paycheck instead of every two weeks.

¶ 9 In November 2009, Susan filed a motion for leave to file a third-party complaint pursuant to section 2-406 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-406 (West 2008)), seeking to have Caterpillar named as third-party defendant. Susan alleged that on

or about December 23, 2008, Caterpillar was served with a copy of an amended notice to withhold income for child support. The notice required Caterpillar to withhold and pay as child support the sum of \$351.38 on a biweekly basis to the Illinois State Disbursement Unit.

However, Caterpillar began withholding and paying \$175.69 on a biweekly basis. The trial court entered an order granting leave to file the third-party complaint.

¶ 10 In December 2009, Susan filed the third-party complaint against Caterpillar. Susan alleged Caterpillar knowingly withheld a dollar amount that was substantially below the required amount for 19 separate and consecutive biweekly pay periods from January 30, 2009, to October 9, 2009. Susan claimed Caterpillar knowingly violated section 35(a) of the Income Withholding for Support Act (Withholding Act) (750 ILCS 28/35(a) (West 2008)). Susan asked for a judgment against Caterpillar of \$3,338.11 for the amount of child support knowingly underwithheld for the 19 pay periods at \$175.69 per pay period. Susan also sought a money judgment as of November 18, 2009, in the amount of \$294,300, as penalty for 2,943 separate and knowing violations of the Withholding Act, plus \$1,900 per day for each and every day from November 18, 2009, to the date of entry of the judgment.

¶ 11 In February 2010, Caterpillar filed a motion to dismiss the complaint pursuant to section 2-619 of the Procedure Code (735 ILCS 5/2-619 (West 2010)). Caterpillar claimed the failure to withhold the entire amount owed to Susan from Loren's paycheck was a result of a clerical error that was immediately corrected after Caterpillar received notice of the oversight. Caterpillar stated the Withholding Act's penalties do not apply to an innocent or negligent employer. In April 2010, the trial court denied the motion to dismiss.

¶ 12 In February 2012, Caterpillar filed a motion for summary judgment pursuant to section 2-1005 of the Procedure Code (735 ILCS 5/2-1005 (West 2012)). In March 2012, Susan

responded to the motion for summary judgment. Therein, she stated that on February 2, 2010, Caterpillar paid \$3,300 of the \$3,338.11 it owed for the 19 consecutive underwithholdings. Susan also claimed her case was not an isolated event and alleged Caterpillar had engaged in a pattern of failing to properly acknowledge court orders concerning its employees. In May 2012, the trial court denied the motion for summary judgment.

¶ 13 In June 2013, the trial court held a bench trial. Susan testified she filed for divorce in August 2005 after the 24-year marriage. In January 2008, the court entered an order requiring Loren to pay child support in the amount of \$260.58 per week. Susan's exhibit No. 4 indicated Caterpillar deducted the amount of \$260.58 per week from Loren's paycheck starting on January 12, 2007. After this court's decision on appeal, Loren filed two petitions to modify child support. The parties then agreed to a reduced support amount of \$175 per week. Susan's exhibit No. 1, a notice to withhold income for child support, directed Caterpillar to pay \$175.69 per week from August 29, 2008, to June 7, 2013. The notice also lists a biweekly amount of \$351.38. Susan was under the belief that Loren was paid biweekly. In January 2009, Caterpillar paid \$175.69 every two weeks for 19 pay periods. Susan called Caterpillar and her attorney about the discrepancy. She did not remember with whom she spoke at Caterpillar.

¶ 14 Susan stated Caterpillar was served with a second court order and started withholding the correct amount "for a while." On October 23, 2009, Caterpillar started withholding \$350 every two weeks. Susan stated Caterpillar paid \$3,300 for the 19 consecutive withholdings on February 1, 2010, and an additional \$38.11 on May 22, 2010. On November 5, 2010, Caterpillar started paying \$174.99 per week for 28 pay periods. Susan stated the support order did not terminate until June 7, 2013. She claimed Caterpillar made the final withholding payment on May 24, 2013, and thus shortchanged her \$475.

¶ 15 Jeffrey Richardson represented Susan in the dissolution case. He testified to Susan's exhibit No. 1, the notice to withhold income for child support filed in December 2008. The notice listed the weekly amount of child support as \$175.69 and the biweekly amount as \$351.38. Upon learning Caterpillar was withholding the wrong amount, Richardson brought a contempt petition against Loren. Thereafter, in an August 2009 order, the trial court directed Caterpillar to immediately correct its records and begin deducting child support at a rate of \$175 per week from Loren's paycheck. In Susan's exhibit No. 3, Richardson received a letter, dated October 16, 2009, from Karen Kilpatrick of Caterpillar, indicating Kilpatrick received documentation regarding Loren's child support and confirmed that \$350 was being deducted biweekly from his paycheck.

¶ 16 Jeff Stiefvater, payroll manager at Caterpillar, testified that in January 2009, two employees were able to enter wage garnishment information into the system. He stated the information entered into the system is not double-checked because the individuals "are very knowledgeable about the garnishment processes" and they "do it on a regular basis with a high degree of accuracy."

¶ 17 Karen Kilpatrick testified she works as a payroll specialist at Caterpillar. Her job responsibilities involved overseeing garnishments and corresponding with employees, ex-spouses, and attorneys. Child-support orders were part of garnishments. Kilpatrick stated the child-support amount to be withheld in this case was \$351.38 every two weeks but the amount entered was \$175.69 every two weeks. Kilpatrick stated no one checked the work of the employee who entered the amounts to be withheld.

¶ 18 Kilpatrick testified she received the trial court's August 14, 2009, order and counsel's letter in exhibit No. 2. She drafted a letter in response (exhibit No. 3), confirming \$350

was being deducted biweekly from Loren's paycheck. She stated Caterpillar elected not to do anything with respect to the prior 19 consecutive underwithholdings. She stated Caterpillar followed the court order on October 23, 2009, by deducting \$350. On February 1, 2010, Caterpillar paid \$3,300. On May 24, 2010, Caterpillar paid another \$38.11. Kilpatrick believed the \$38.11 involved administrative fees. Kilpatrick stated she had no reason to knowingly withhold child support from Susan.

¶ 19 On the issue of the \$174.99 withholdings, Kilpatrick explained it as "a system thing." She stated the calculations are done by computer and "it must have cut by a penny." The timing of this withholding coincided with Loren being on disability and being paid on a weekly, instead of biweekly, basis.

¶ 20 Britt Brown, an attorney, testified he has sued individuals employed by Caterpillar numerous times on behalf of his client Midwest Credit and Collection. Brown stated he was aware of at least seven cases in which Caterpillar failed to comply with a wage deduction summons.

¶ 21 Following trial, Susan filed a motion to amend the pleadings to conform to the proofs. Susan noted she alleged 19 separate violations of the Withholding Act in her original complaint. She now alleged Kilpatrick admitted Caterpillar withheld the sum of \$174.99 on 25 separate occasions when it should have withheld \$175. She also alleged Caterpillar failed to withhold for  $2 \frac{5}{7}$  weeks before the minor turned 18.

¶ 22 The parties submitted written closing arguments. In August 2013, the trial court entered its written order. The court denied Susan's motion to amend the pleadings based on untimeliness and undue surprise. Also, the court found Susan failed to prove by a preponderance of the evidence that Caterpillar "acted knowingly—*i.e.* intentionally or on purpose—in

underwithholding the child support." Instead, the court found Caterpillar's underwithholding "was the result of innocent or negligent error." The court entered judgment in favor of Caterpillar. This appeal followed.

¶ 23

## II. ANALYSIS

¶ 24

### A. Section 35(a) of the Withholding Act

¶ 25

Susan argues the trial court erred in finding Caterpillar did not knowingly fail to withhold the proper amount from Loren's paychecks pursuant to section 35(a) of the Withholding Act. We disagree.

¶ 26

On appeal from a bench trial, this court will not disturb the trial court's factual findings unless they are against the manifest weight of the evidence. *Southwest Bank of St. Louis v. Pouloukefalos*, 401 Ill. App. 3d 884, 890, 931 N.E.2d 285, 290 (2010). However, the interpretation of a statute is a question of law that is reviewed *de novo*. *Metropolitan Life Insurance Co. v. Hamer*, 2013 IL 114234, ¶ 18, 990 N.E.2d 1144.

¶ 27

Section 35 of the Withholding Act (750 ILCS 28/35 (West 2008)) sets forth the duties of employers who have been served with an income-withholding notice in connection with court-ordered support such as child support or maintenance. Section 35(a) provides, in part, as follows:

"The payor shall pay the amount withheld to the State Disbursement Unit within 7 business days after the date the amount would (but for the duty to withhold income) have been paid or credited to the obligor. If the payor *knowingly fails* to withhold the amount designated in the income withholding notice or to pay any amount withheld to the State Disbursement Unit

within 7 business days after the date the amount would have been paid or credited to the obligor, then the payor shall pay a penalty of \$100 for each day that the amount designated in the income withholding notice (whether or not withheld by the payor) is not paid to the State Disbursement Unit after the period of 7 business days has expired." (Emphasis added.) 750 ILCS 28/35(a) (West 2008).

¶ 28 This issue in this case centers on whether Caterpillar "knowingly" failed to withhold the correct amount from Loren's paycheck. Susan claims "an employer 'knowingly fails to withhold the amount designated in the income withholding notice' when the evidence shows that the employer has at its disposal the means to comply with the notice, but it does not take advantage of those means and, as a result, fails to withhold or under-withholds." We find the answer to the question of when a payor "knowingly" fails to withhold can be found in decisions from this court.

¶ 29 In *Dunahee v. Chenoa Welding & Fabrication, Inc.*, 273 Ill. App. 3d 201, 203, 652 N.E.2d 438, 441 (1995), this court found a "knowing" violation where, although the employer withheld the proper amount from the employee's paycheck every week, the employer mailed the checks only once a month. Thus, the employer admitted consistent noncompliance with the withholding order by intentionally forwarding the payments only once a month for several months. *Dunahee*, 273 Ill. App. 3d at 208, 652 N.E.2d at 444. Noting the employer offered no compelling excuse for its noncompliance, claiming only ignorance and an unwillingness to use three postage stamps per month, this court found the failure of the trial court to apply the statutory penalties amounted to an abuse of discretion. *Dunahee*, 273 Ill. App. 3d at

209-10, 652 N.E.2d at 445. In reaching this conclusion, this court stated as follows:

"[T]he employer penalty provision seeks not only to ensure a child support obligee receives the owed child support payments, but also that the obligee receives the support payments *in a timely manner*.

Here, defendant did *not* pay plaintiff in a timely manner. \*\*\*

Indeed, without the application of a penalty, employers would have an incentive to *not* send in a withheld child support payment in a timely manner. The longer a withheld child support check is not mailed to the obligee, the longer those funds are available for the employer to use to its own advantage, either to help support the operation of its business activities, or to allow invested money to yield a higher return." (Emphasis in original.) *Dunahee*, 273 Ill. App. 3d at 208-09, 652 N.E.2d at 444-45.

¶ 30 In *Thomas v. Diener*, 351 Ill. App. 3d 645, 656, 814 N.E.2d 187, 196 (2004), the employer complied with the statute by paying over the income from each check within the seven-day period after paying the employee. However, the employer discovered in October 2001 that a child support check was not written or paid over from the pay period ending January 28, 2000. *Thomas*, 351 Ill. App. 3d at 647, 814 N.E.2d at 189. The employer testified that, even though the employee had worked only one day that week, the employer had cut him a check and the failure to issue the child support check was an oversight. *Thomas*, 351 Ill. App. 3d at 647-49, 814 N.E.2d at 189-90. In addition, the State Disbursement Unit returned a support check (November 2000 check) to the employer because it was made payable to an unacceptable payee. *Thomas*, 351 Ill. App. 3d at 649, 814 N.E.2d at 190. The employer then changed the payee and

mailed it back to the State Disbursement Unit. *Thomas*, 351 Ill. App. 3d at 649, 814 N.E.2d at 190-91.

¶ 31 Based on these facts, this court found the trial court erred in imposing a 622-day penalty on the January 2000 check and an 11-day penalty on the November 2000 check because neither constituted a "knowing" violation under the Withholding Act. *Thomas*, 351 Ill. App. 3d at 656, 814 N.E.2d at 196. This court pointed out *Dunahee*'s analysis of the House debates on the applicable statute:

"Representative Dunn was concerned that a penalty imposed upon an employer at the rate of \$100 a day was unduly harsh and could be unfair to smaller employers, especially those who had more than one employee subject to an order to withhold. Representative Frederick attempted to ease Representative[] Dunn's concerns by indicating that the penalty would not apply to an innocent or negligent employer, but to one who intentionally withheld a child support payment from the custodial parent." *Thomas*, 351 Ill. App. 3d at 656, 814 N.E.2d at 196 (citing *Dunahee*, 273 Ill. App. 3d at 207-08, 652 N.E.2d at 444).

Unlike *Dunahee*, where the employer knew it was not paying over the income in a timely manner, this court concluded the employer in *Thomas* was, at worst, negligent. *Thomas*, 351 Ill. App. 3d at 656, 814 N.E.2d at 196. We found the employer was "cognizant of forwarding the child support within the required seven business days and, except for a few innocent exceptions, the evidence did not demonstrate that [the employer] failed to do so." *Thomas*, 351 Ill. App. 3d at 656, 814 N.E.2d at 196.

¶ 32 We find the facts in this case more in line with *Thomas* than *Dunahee*. The evidence indicated Caterpillar received a withholding notice directing it to withhold \$175.69 per week from Loren's paychecks. Caterpillar withheld that exact amount from each of defendant's paychecks and forwarded the payments to the State Disbursement Unit. Unfortunately, while the amount was correct, Loren was paid every fortnight and not weekly. The evidence clearly showed the mistake was an inadvertent clerical error and not one designed to deliberately deprive Susan of her court-ordered support.

¶ 33 We note the trial court found Susan's telephone calls did not put Caterpillar on notice of the withholding mistake. The court stated Susan's testimony was "vague and uncertain," as she did not remember the number she called, the name of the person she spoke to, or the Caterpillar department she called. We find the court's factual findings were not against the manifest weight of the evidence.

¶ 34 Here, the evidence indicated Caterpillar made an inadvertent clerical error upon receipt of the withholding notice and did not knowingly fail to comply with the Withholding Act. See *In re Marriage of Miller*, 227 Ill. 2d 185, 202, 879 N.E.2d 292, 302 (2007); *In re Marriage of Gulla*, 382 Ill. App. 3d 498, 503, 888 N.E.2d 585, 588-89 (2008) (holding the employers knowingly violated the Withholding Act when they essentially disregarded the withholding notices they received). Accordingly, we find the trial court did not err in finding in favor of Caterpillar and against Susan.

¶ 35 B. Motion To Amend Pleadings

¶ 36 Susan argues the trial court erred in denying her motion to amend the complaint to conform to the proofs. We disagree.

¶ 37 Section 2-616 of the Procedure Code (735 ILCS 5/2-616 (West 2012)) allows a

party to, prior to final judgment, amend pleadings to change or add a cause of action. Moreover, section 2-616(c) allows for the amendment of a pleading "at any time, before or after judgment, to conform the pleadings to the proofs." 735 ILCS 5/2-616(c) (West 2012). However, our supreme court has noted "a party's right to amend is not absolute and unlimited." *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467, 605 N.E.2d 493, 508 (1992). Instead, the decision to grant leave to amend a pleading rests within the sound discretion of the trial court and that decision will not be disturbed on appeal absent an abuse of that discretion. *Lee*, 152 Ill. 2d at 467, 605 N.E.2d at 508.

"The factors in deciding whether a trial court abused its discretion on a motion to amend a pleading include: (1) whether the amendment would cure a defect in the pleading; (2) whether the proposed amendment was timely; (3) whether the opposition would be prejudiced or surprised by the amendment; and (4) whether there were earlier opportunities to amend the pleading." *1515 North Wells, L.P. v. 1513 North Wells, L.L.C.*, 392 Ill. App. 3d 863, 870, 913 N.E.2d 1, 8 (2009) (citing *Lee*, 152 Ill. 2d at 467-68, 605 N.E.2d at 508).

See also *Florek v. Kennedy*, 249 Ill. App. 3d 221, 238, 618 N.E.2d 760, 771 (1993) (stating the trial court may consider the timeliness of the motion to amend as well as any prejudice or surprise to the other party).

¶ 38 In the case *sub judice*, the bench trial was held on June 26, 2013. Susan elicited evidence that Caterpillar underwithheld child support on 25 occasions beginning in 2010 by withholding \$174.99 instead of \$175. Also, Susan elicited testimony that Caterpillar stopped

withholding child support two weeks and five days before it was to terminate on June 7, 2013. On June 28, 2013, Susan filed a motion to amend the pleadings to conform to the proofs. She sought to add count II, alleging Caterpillar made one-cent underwithholdings on 25 occasions. The trial court denied the motion to amend based on untimeliness and undue surprise.

¶ 39 We note Susan filed her third-party complaint against Caterpillar in December 2009. The one-cent underwithholdings started in November 2010 and lasted until May 2011. However, despite having this information readily available, Susan did not seek to amend her complaint until June 2013, and thus it was untimely. Moreover, it resulted in surprise to Caterpillar, which had no idea that the penny underwithholdings would be a matter of contention and thereby had no opportunity to investigate and prepare a defense against a two-bit error and the \$242,700 Susan sought in statutory penalties. We find no abuse of discretion in the trial court's denial of Susan's motion to amend the pleadings.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm the trial court's judgment.

¶ 42 Affirmed.