2017 IL App (2d) 160641-U
No. 2-16-0641
Order filed May 25, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF COLLEEN L. MORGAN, Petitioner and Third-Party Plaintiff-Appellant, and JAMES M. MORGAN, Respondent (Dr. Green Management, Inc., a/k/a Dr. Green Services, Third-Party Defendant-Appellee).	)))))))))))))	Appeal from the Circuit Court of Du Page County. No. 09-D-1139 Honorable John W. Demling, Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly ruled for third-party defendant on petitioner's complaint under the Income Withholding for Support Act: in light of defendant's undisputed evidence, the court was entitled to find that defendant's failures to withhold were not knowing under section 35(a); even if petitioner complied with the notice provision of section 45(j), defendant complied with that section and thus petitioner was not entitled to relief thereunder.

¶ 2 Petitioner, Colleen L. Morgan, filed a third-party complaint under section 35(a) of the Income Withholding for Support Act (Act) (750 ILCS 28/35(a) (West 2014)) against third-party defendant, Dr. Green Management, Inc., a/k/a Dr. Green Services (Dr. Green), alleging that Dr. Green knowingly failed to withhold money owed for child support from the wages of respondent, James M. Morgan, in accordance with a judgment dissolving Colleen's marriage to James. Colleen sought an order directing Dr. Green to pay her the past-due support, in addition to a $100-per-day penalty, totaling at least $525,900. After a bench trial, the trial court found that Colleen was not entitled to the penalty, because Dr. Green's failure to pay was not knowing. The trial court ordered Dr. Green to pay the interest due on the support (as Dr. Green had already paid the past-due support prior to trial) and Colleen's attorney fees. Colleen filed a motion for reconsideration, seeking payment of the penalty. The trial court denied the motion, and Colleen timely appealed. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The marriage of Colleen and James was dissolved on July 9, 2009, and James was ordered to pay Colleen $100 per week for child support.

¶ 5 On January 31, 2012, James's employer, Dr. Green (a lawn-care company), was served with an "Order/Notice to Withhold," in accordance with section 35(a) of the Act, advising Dr. Green that it was required to deduct $100 weekly (or $200 biweekly) from James's wages until June 1, 2023, and remit the withholding to the Illinois Child Support Disbursement Unit (SDU).

¶ 6 On April 10, 2012, Colleen filed her first third-party complaint against Dr. Green, alleging that, although James advised her that child support had been withheld from his wages, she had not received any payments since February 1, 2012. Colleen sought an order requiring

Dr. Green to pay all sums withheld, in addition to a $100-per-day penalty. On August 28, 2012, the complaint was voluntarily dismissed.

¶ 7 On December 16, 2015, Colleen filed her second third-party complaint against Dr. Green. According to Colleen, Dr. Green began submitting the support payments withheld from James's wages after being notified of the initial third-party complaint on April 27, 2012, and it had submitted payments through September 23, 2013. However, as of September 23, 2013, despite James's continued employment through October 2015, Dr. Green had failed to submit withholdings to the SDU. Colleen further alleged that Dr. Green's failure to comply with the Act was knowing and that she was therefore entitled to the $100-per-day penalty provided by section 35(a) of the Act. She sought an order requiring Dr. Green to pay her the support due as of September 23, 2013, and the statutory penalty, totaling at least $525,900.

¶ 8 On January 25, 2016, Dr. Green filed its answer. Dr. Green admitted that, on January 31, 2012, it had received the "Order/Notice to Withhold" and that it had employed James until September 18, 2015. Dr. Green also admitted that it failed to withhold the support payments from James's paycheck between October 4, 2013, and September 19, 2015, and send the withholdings to the SDU; however, Dr. Green stated that it had done so inadvertently due to a clerical error. Dr. Green indicated that, upon receiving notice of the most recent complaint, it sent a $10,400 payment to the SDU. Dr. Green asserted that, because it did not knowingly fail to make such payments, it was not subject to the statutory penalty.

¶ 9 A trial took place on May 9, 2016. At the outset, Colleen argued that, under section 35(a) of the Act, the failure of a payor on more than one occasion to withhold creates a presumption that the payor knowingly failed to pay, and because the pleadings established Dr. Green's knowing failure to pay, she would not present any further evidence. In response, Dr. Green

argued that its failure to pay "was nothing more than a clerical error. Once it was brought to the company's attention, they immediately rectified it and paid it in full." Dr. Green presented testimony from two witnesses in support.

¶ 10 Gary Van Haastrecht, Dr. Green's human-resources manager, explained why child support had not been withheld from James's wages between October 4, 2013, and September 19, 2015. According to Van Haastrecht, in October 2013, James received a regularly scheduled paycheck with the requisite child-support deduction. At that time, James informed him that he had been underpaid, due to a mistake James had made punching in. When Van Haastrecht processed an additional paycheck (during that same pay period) to make up for the underpayment, child support was automatically deducted. Because the child support had already been deducted for that pay period, Van Haastrecht attempted to do a one-time override with the following paycheck, but the override became permanent. Van Haastrecht did not learn of this error until Colleen filed the complaint over two years later. Van Haastrecht testified that, had it been brought to his attention earlier, he would have corrected it immediately. After learning of the error, Van Haastrecht calculated the amount due, which Colleen confirmed, and Van Haastrecht paid $10,400. Colleen did not ask for interest, and he did not pay her interest.

¶ 11 Van Haastrecht also testified regarding Colleen's initial complaint, which arose due to Dr. Green's failure to withhold child support between February and April 2012. Van Haastrecht testified that James was the first employee for whom Dr. Green had been ordered to deduct child support. Van Haastrecht had called Dr. Green's third-party payroll provider, Ceridian, for instructions on how to set up the child-support deduction. Van Haastrecht followed Ceridian's instructions, and Ceridian informed him that it was set up correctly. Van Haastrecht testified that his payroll records had shown that the child-support deductions were being made; however, Van

Haastrecht later learned that the funds were not being distributed to the SDU. As soon as he became aware of the problem, he corrected it. Ceridian had admitted that it was at fault.

¶ 12 Mark Kittner, a Dr. Green employee, confirmed that James had been underpaid in October 2013 due to a failure to punch in. Kittner contacted Van Haastrecht, who rectified the situation. Later, James told Kittner that child support had been erroneously withheld from the paycheck that had been issued to correct the underpayment. Again, Kittner contacted Van Haastrecht to let him know. Kittner never learned of any other errors from James, who no longer worked at Dr. Green.

¶ 13 Following testimony, the court inquired as to when Dr. Green made the $10,400 payment and was informed that the payment had been made to the SDU within seven business days of the date that the complaint was filed. Nevertheless, Colleen argued that, under section 45(j) of the Act (750 ILCS 28/45(j) (West 2014)), Dr. Green was "not exonerated," because it did not pay Colleen interest. Colleen conceded that, during conversations with Dr. Green about the payment, she did not ask for interest. Dr. Green argued that it had asked Colleen for the total amount due and was informed that it was $10,400. Dr. Green agreed to pay the interest, stating that it did know that it was due. The court chided the parties for not communicating on the issue prior to coming to court.

¶ 14 The court stated: "This appears to be an unfortunate but human error that was done without—without intent, and it was not knowing. It should have been resolved in a matter of—why somebody had to wait a year and-a-half or whatever that timeframe is to let the company know that they weren't withholding, I don't understand." The court noted that "as soon as [Dr. Green] realized there was an error, they were willing to pay whatever they were obligated to pay, in terms of the outstanding money, including the interest." The court acknowledged that Dr.

Green "did not pay the interest on time." However, the court stated that the $100 daily penalty is "not intended to be a windfall for anybody. It is supposed to be a penalty for somebody who intentionally is—is flipping you off basically." The court held that no penalty was due Colleen, because Dr. Green's failure to comply with the Act was not knowing. The court ordered Dr. Green to pay the interest due and Colleen's attorney fees.

¶ 15 On June 3, 2016, Colleen filed a motion for reconsideration. Colleen argued that she was entitled to $197,000 in penalties under section 45(j) of the Act, because Dr. Green failed to pay, within 14 days of notice, the total amount due plus interest. In response, Dr. Green argued, *inter alia*, that Colleen failed to comply with the notice provision of section 45(j) of the Act and that, even if she did, Dr. Green met its obligation under the Act by notifying Colleen of its reason for nonpayment during an attorney conference call on January 6, 2016, within 14 days of receiving the complaint. The trial court denied the motion for reconsideration, finding that Colleen failed to comply with section 45(j)'s notice provision.

¶ 16 Colleen timely appealed.

¶ 17 II. ANALYSIS

¶ 18 Colleen first argues that the trial court erred in finding that Dr. Green did not knowingly fail to withhold child-support payments under section 35(a) of the Act.

¶ 19 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. *In re Marriage of Chen*, 354 Ill. App. 3d 1004, 1011 (2004). A court's factual findings are against the manifest weight of the evidence only when an opposite conclusion is clearly apparent or when they are unreasonable, arbitrary, or not based on the evidence. *In re Marriage of Faber*, 2016 IL App (2d) 131083, ¶ 3. Where we must determine the correctness of the trial court's application of the law to the

undisputed facts, our review is *de novo*. *MidAmerica Bank, FSB v. Charter One Bank, FSB*, 232 Ill. 2d 560, 565 (2009).

¶ 20 Section 35 of the Act (750 ILCS 28/35 (West 2014)) sets forth the duties of employers who have been served with an income-withholding notice in connection with court-ordered child support. Section 35(a) provides, in part, as follows:

> "The payor shall pay the amount withheld to the [SDU] 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 [SDU] 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 [SDU] after the period of 7 business days has expired. *** The failure of a payor, on more than one occasion, to pay amounts withheld to the [SDU] within 7 business days after the date the amount would have been paid or credited to the obligor creates a presumption that the payor knowingly failed to pay over the amounts." (Emphasis added.) 750 ILCS 28/35(a) (West 2014).

¶ 21 Colleen argues that Dr. Green's claim of inadvertence was insufficient to rebut the presumption that it knowingly failed to withhold. According to Colleen, Dr. Green knew that it was required to comply with the Act and knowingly stopped the withholding. In response, Dr. Green argues that it rebutted the presumption by presenting testimony that it was entirely unaware that it had not withheld child support from October 2013 to September 2015. We agree with Dr. Green.

¶ 22 "Illinois case law makes clear that penalties provided for by section 35 of the [Act] should only be imposed on those employers who purposely disregard a court's support order." *In re the Marriage of Solomon*, 2015 IL App (1st) 133048, ¶ 35. For instance, in *Solomon*, the payor was served with a notice to withhold. *Id.* ¶ 5. The payor complied with the notice but had mistakenly entered the withholdings as bimonthly, instead of biweekly, which resulted in a failure to withhold from the obligor's third paycheck in the months of December 2010 and June 2011. *Id.* ¶ 33. The payor did not realize that it had made an error until being served with the obligee's complaint, at which time it paid the missing support. *Id.* The court found that the payor's failure to withhold was "an unintentional and honest mistake" and not a knowing violation. *Id.* ¶ 35.

¶ 23 Similarly, in *Thomas v. Diener*, 351 Ill. App. 3d 645, 656 (2004), the payor complied with the Act by paying over the income from each check within the seven-day period after paying the obligor. However, the payor discovered in October 2001 that a child-support check (January 2000 check) was not written or paid over from the pay period ending January 28, 2000. *Id.* at 647. The payor testified that the oversight occurred because the obligor had worked only one day that week. *Id.* at 647-49. In addition, the SDU returned a support check (November 2000 check) to the payor because it was made payable to an unacceptable payee. *Id*. at 649. The payor then changed the payee and mailed it back to the SDU. *Id.* Based on these facts, the court found that 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 Act. *Id.* at 656. The court concluded that the payor was, at worst, negligent. *Id.*

¶ 24 In cases where a knowing violation of section 35(a) was found, the payor was aware that it was failing to withhold. In *Dunahee v. Chenoa Welding & Fabrication, Inc.*, 273 Ill. App. 3d

201 (1995), the court found a knowing violation where, although the payor withheld the proper amount from the obligee's paycheck every week, the payor mailed the checks only once a month. The payor admitted that it was intentionally noncompliant with the withholding order by forwarding the payments only once a month for several months, due to an unwillingness to use three postage stamps per month. *Id.* at 203.

¶ 25 In *In re Marriage of Chen and Ulner*, 354 Ill. App. 3d 1004 (2004), the payor became aware, on August 23, 2000, that, although the requisite payments were being withheld from the obligor's wages, they were not being forwarded to the SDU. *Id.* at 1009. The payor wrote a check for $933.42 to cover the withholding through August 23, 2000, but it was not mailed until the end of December and not received by the SDU until January 5, 2001. *Id.* In addition, child support from two paychecks, dated August 24 and September 1, 2000, was not paid to the SDU until October 2, 2001. *Id.* This court found a knowing violation because, as in *Dunahee*, the payor "offered no compelling excuse for consistently failing to comply with the statute." *Id.* at 1018.

¶ 26 In *In re Marriage of Miller*, 227 Ill. 2d 185 (2007), the payor withheld the required support from the obligor's wages but did not forward the withholdings to the SDU. *Id.* at 188. When the payor was notified that he missed 19 payments, he eventually forwarded the support to the SDU but failed to stay current. *Id.* Six months later, the obligee brought suit against the payor. *Id.* at 189. The payor did not file an answer until two years later. *Id.* During that time period, the payor violated the Act on 11,721 occasions. *Id.* at 201. Although he withheld the support from the obligor's wages, he waited five weeks after the suit was filed before mailing a check to the SDU and failed to mail any further payments for another 20 weeks. *Id.* A 10-month delay preceded the next payment. *Id.* The court found that the payor "repeatedly and knowingly

violated the statute and his noncompliance continued *** even after suit was filed." *Id.* at 202. The court described the payor's conduct as "egregious." *Id.* at 203.

¶ 27 In *In re Marriage of Gulla*, 382 Ill. App. 3d 498 (2008), *aff'd*, 234 Ill. 2d 414 (2009), this court found a knowing violation where the payor, which was located in Mississippi, received a notice of withholding of income for support but did not withhold. *Id.* at 503. In defense, the payor argued that it could not comply with the notice, which ordered $3000 monthly withholding, because Mississippi law prohibited withholding more than half of the obligor's income. *Id.* at 501. According to the payor, since it could not comply with the withholding notice, it should not be penalized under section 35 of the Act for knowingly failing to withhold income. *Id.* at 502. We disagreed, reasoning that, if the ordered amount of withholding violated Mississippi law, then the payor should have withheld only the amount allowed under Mississippi law. *Id.* at 503. We also noted that the notice of withholding instructed the payor to contact the obligee's attorney if any questions about the notice or the payor's obligations pursuant to the notice arose. *Id.*

¶ 28 The evidence in the present case makes clear that Dr. Green's failure to withhold was unintentional. Van Haastrecht testified that James was the first employee for whom Dr. Green was required to withhold support payments and that he contacted Ceridian for instructions on how to properly set up payroll processing for James. Upon learning (by the filing of Colleen's initial complaint) that the support payments were being withheld from James's wages but not distributed to the SDU, Van Haastrecht immediately rectified the situation. The next time Van Haastrecht learned of an error (by the filing of the second complaint), he again immediately rectified the situation. There is no indication that Van Haastrecht, or anyone at Dr. Green, was aware that support was not being withheld or transmitted to the SDU at any time after September

2013. Although there was a presumption under the Act that Dr. Green's failure to withhold was knowing as it happened on more than one occasion, Dr. Green rebutted that presumption by providing a credible and undisputed explanation as to why it occurred. This distinguishes the case upon which Colleen relies. See *In re Marriage of Smith*, 265 Ill. App. 3d 249, 255 (1994) (the presumption that property held in joint tenancy is marital property can be overcome only by clear and convincing evidence; husband's self-serving assertion of his intent was not clear and convincing evidence sufficient to rebut the presumption). Here, Van Haastrecht explained that, in an effort to correct a payroll mistake, he made what he thought was a one-time override of the withholding. It was not until Dr. Green was served with the complaint that Van Haastrecht became aware that the override had continued. Kittner's testimony supported Van Haastrecht's explanation. Based on the foregoing, we find that the trial court's conclusion that Dr. Green's failure to withhold was unknowing was not against the manifest weight of the evidence. See *Solomon*, 2015 IL App (1st) 133048, ¶¶ 8, 32-35 (finding the credible testimony of the payroll processor that she made a clerical error, without corroboration, sufficient to rebut the presumption that the failure to withhold was knowing).

¶ 29 Colleen next asserts that the trial court erred in failing to impose a $100-per-day penalty under section 45(j) of the Act, which provides as follows:

> "(j) If an obligee who is receiving income withholding payments under this Act does not receive a payment required under the income withholding notice, he or she must give written notice of the non-receipt to the payor. The notice must include the date on which the obligee believes the payment was to have been made and the amount of the payment. The obligee must send the notice to the payor by certified mail, return receipt requested.

> After receiving a written notice of non-receipt of payment under this subsection, a payor must, within 14 days thereafter, either (i) notify the obligee of the reason for the non-receipt of payment or (ii) make the required payment, together with interest at the rate of 9% calculated from the date on which the payment of income should have been made. A payor who fails to comply with this subsection is subject to the $100 per day penalty provided under subsection (a) of Section 35 of this Act." 750 ILCS 28/45(j) (West 2014).

The court found that Colleen did not comply with the notice requirements of section 45(j) of the Act. According to the court, because the Act is a penal statute, strict compliance was required. See *Schultz v. Performance Lighting, Inc.*, 2013 IL App (2d) 120405 (strict compliance with the Act was required as the statute is penal and thus obligee's failure to include obligor's social security number in the notice of withholding invalidated the notice).

¶ 30 With respect to the court's ruling, Colleen argues only that "[t]he trial court erred in failing to find that both the interest payment of 9% and the penalty payment of $100 per day applied and failing to recognize personal service upon the defendant was adequate."

¶ 31 Colleen has forfeited her challenge to the court's ruling on this issue by failing to develop any meaningful argument in support. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); see also *Housing Authority of Champaign County v. Lyles*, 395 Ill. App. 3d 1036, 1040 (2009) (finding that improperly developed argument does "not merit consideration on appeal and may be rejected for that reason alone"). Here, the only authority cited by Colleen is *People v. Williams*, 2012 IL App (2d) 111157, ¶ 14, and this authority is cited without comment.

¶ 32 A reviewing court is not a repository into which an appellant may dump the burden of argument and research, and the failure to clearly define issues and support them with authority

results in forfeiture of the argument. *CE Design, Ltd. v. Speedway Crane, LLC*, 2015 IL App (1st) 132572, ¶ 18. We will not become an advocate for, as well as the judge of, points the appellant seeks to raise. *People v. Trimble*, 181 Ill. App. 3d 355, 356 (1989). Accordingly, we do not consider whether the trial court erred in holding that Colleen failed to give proper notice under section 45(j) of the Act.

¶ 33 Even if we were to find that notice was properly given, Dr. Green met its obligations under the plain language of section 45(j), which provides that, within 14 days of receiving notice of nonpayment, the payor must "either (i) notify the obligee of the reason for the non-receipt of payment or (ii) make the required payment, together with interest at the rate of 9% calculated from the date on which the payment of income should have been made." 750 ILCS 28/45(j) (West 2014). Here, counsel for Dr. Green advised the court that, within 14 days of receiving the complaint, he telephoned counsel for Colleen to explain the reason why payment had not been made. Colleen did not dispute this fact below, nor does she do so on appeal. Indeed, in her reply brief, she states only: "In the event that this Court determines that Dr. Green complied with Section 45(j) by providing an explanation for why it had not withheld support, the explanation does not negate the penalty provision of Section 35(a)." As noted, the trial court was entitled to accept that explanation.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 36 Affirmed.