UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 997

September Term, 2006

CATAPULT TECHNOLOGY, LTD.

v.

PAUL WOLFE, et al.

Kenney,
Barbera,
Sharer,

JJ.

Opinion by Barbera, J.

Filed: August 20, 2007

Kenney, J., participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

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The parties to this appeal are appellant, Catapult Technology, Ltd. ("Catapult") and fourteen former employees of Catapult ("the Employees").[1] The Employees filed a complaint against Catapult in the Circuit Court for Montgomery County alleging violation of Maryland's Wage Payment and Collection Law, Md. Code (1991, 1999 Repl. Vol.), § 3-501, *et seq.*, of the Labor and Employment Article ("the WPCL"). The court granted the Employees' Motion for Partial Summary Judgment, thereby concluding that Catapult violated the WPCL. The case then came on for a jury trial on the remaining issue of whether the Employees were entitled to treble damages under the WPCL. The jury found in favor of the Employees, awarding them treble damages.

Catapult appeals and presents two questions for our review, which we have reworded:

> I. Did the circuit court err in finding that Catapult's leave policy violated Maryland law?
>
> II. Did the Employees present sufficient evidence to support a jury verdict that there was no bona fide dispute between the parties regarding Catapult's withholding of unused accrued leave?

For the reasons that follow, we hold that the circuit court did not err in concluding that Catapult's leave policy violated Maryland law. We further hold, however, that there was insufficient evidence to support the jury's verdict that there was no bona fide dispute between the parties such as would entitle the

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[1] The Employees' names are: Paul Wolf, Leroy D. Hill, Cecil Kelly, Alexander Bogdanovsky, Laurel A. Harrison, Peter J. Matsuki, Tahir Mahmood, Annamarie D. Lloyd, Miguel H. Morales, Benjamin T. Levin, Biniam Tekle, Alan S. Aleshire, Steven A. Fischer, and Kevin D. Maher.

Employees to treble damages under the WPCL.

FACTS AND PROCEEDINGS

Catapult is a government contractor that provides technology and business services to the federal government. In late 2001, Catapult was awarded a contract ("the contract") to provide network services to the U.S. Department of Transportation ("DOT"). The contract consisted of an initial period of one year and four optional one-year renewal periods. The Employees were employed by Catapult and worked on the contract for approximately three years.

In late August 2004, DOT informed Catapult that it did not intend to renew the contract for the next year, and the contract would be terminated effective September 30, 2004. DOT had elected to award a new contract to Bowhead Information Technology Solutions ("Bowhead").

On August 25, 2004, Rodger Blevins, vice president of Catapult, sent an email to the Employees informing them that DOT was not going to renew the contract. The email stated that Catapult was "negotiating possible terms and conditions for an alternative arrangement" to continue working with DOT.

On August 31, 2004, Catapult held an "all-hands" meeting, which the Employees attended. At the meeting, Mr. Blevins informed the Employees that Catapult intended to appeal the loss of the contract to the Small Business Administration ("SBA"). He indicated that Catapult was "highly confident" that it would win

the appeal.[2]

Mr. Blevins also assured the Employees that, in the event the appeal was unsuccessful, Catapult was attempting to find positions for everyone who would be affected by the loss of the contract. He mentioned the requirement in Catapult's Employee Handbook that employees must provide two weeks notice of resignation. He also mentioned the non-compete provision in their employment contracts.

The contract expired on September 30, 2004, as scheduled. On October 1, 2004, in light of the contract's expiration, all employees under the contract were instructed to report to Catapult's headquarters for job assignments. At that time, the Employees were informed that only six to eight positions were available. They were not given positions, and were told to report back on Monday.

Following the October 1 meeting, the Employees were apparently uncertain about their employment future. That same day, the Employees met with representatives of Bowhead to discuss employment opportunities. After learning that Bowhead had positions for them to continue their work on the contract, the Employees delivered resignation notices to Catapult on the afternoon of October 1. They subsequently accepted employment with Bowhead.

The Employees later learned that Catapult did not intend to pay them for their unused accrued universal leave because, under

[2] Ultimately, Catapult lost the appeal. The SBA did not make its decision until after Bowhead began performance on the contract.

the policy in the Employee Handbook, two weeks notice must be given in order to receive payment for any unused accrued universal leave.[3] On March 24, 2005, the Employees filed a complaint in the Circuit Court for Montgomery County alleging violation of the WPCL. In the complaint, the Employees alleged that Catapult was withholding compensation for unused accrued leave in violation of LE § 3-501, *et seq.* They further alleged that Catapult's actions "were willful and not the result of a bona fide dispute." Catapult filed an answer on April 29, 2005.

On December 29, 2005, the Employees filed a Motion for Partial Summary Judgment with an accompanying Memorandum. In the Memorandum, they argued that the universal leave at issue is a "wage" as defined in the WPCL, and therefore cannot be withheld. Relying on *Medex v. McCabe*, 372 Md. 28 (2002), a case about which we will say more later in the opinion, the Employees further argued that Catapult's attempt to avoid paying them their earned wages is directly contrary to Maryland's public policy and is void.

Catapult filed a Motion for Summary Judgment with an

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[3] Section 7.1 of the Employee Handbook states in pertinent part: "If the employee terminates their employment without first providing at least two weeks notice in writing, that employee forfeits any rights to any universal leave that may have been accrued while employed by the Company." Section 10.2 of the Employee Handbook states in pertinent part: "If you resign without two weeks advance written notice, you may forfeit your eligibility to be rehired and any outstanding universal leave."

Catapult's universal leave provides paid time off from work, for such things as illness and vacation. Universal leave is accrued on a per pay period basis. Unused accrued hours may be carried over to the following year with a maximum accrual of 160 hours. Any hours in excess of 160 will be forfeited at the end of the calendar year.

accompanying Memorandum on that same day. Catapult argued that under Maryland law, "whether an employer has to pay out an employee's accrued but unused paid leave depends on the employer's policy in effect at the time the employee resigns."

After several more oppositions and replies, the court held a Summary Judgment hearing on March 7, 2006. Following the hearing, the court denied Catapult's Motion for Summary Judgment, and granted the Employees' Motion for Partial Summary Judgment. By granting that motion, the court determined as a matter of law that Catapult's policy of withholding unused accrued leave if an employer does not give two weeks notice of resignation violates Maryland law. The court awarded each Employee damages in the amount of his or her unused accrued leave.

On April 24 and 25, 2006, a jury trial was held on the remaining issue of whether the parties had a bona fide dispute concerning Catapult's entitlement to withhold the Employees' unused accrued leave. If there was no such bona fide dispute, then the Employees were entitled, under § 3-507.1(b) of the WPCL, to treble damages.

Paul Wolf and Peter Matsuki, two of the Employees, testified that certain actions of Catapult prevented them from giving the required two weeks resignation. They testified that Catapult led them to believe that they would have jobs regardless of what happened with the contract. They also testified that Catapult

threatened them with legal action if they violated the non-compete provision in their employment agreement by going to work for Bowhead. They described their situation as a "Catch 22": if they resigned with two weeks notice and went to Bowhead, they might get sued, and if they waited until the end of the contract and left without the required notice, they might forfeit their right to unused accrued leave.

Kyle Mulhall, Catapult's general counsel, was called as a witness for both the Employees and Catapult. He testified that Catapult applied the policy in good faith. He explained that when he reviewed and edited the policy, he believed that Catapult's unused leave policy was consistent with Maryland law. He further explained that he advised Catapult to apply the policy to the Employees for consistency, and because he still believed that Catapult's policy is valid and consistent with Maryland law.

Catapult moved, without success, for judgment at the end of the Employees' case and at the end of all of the evidence. The jury found that there was no bona fide dispute as to whether Catapult was obligated to pay the Employees their unused accrued leave. The jury awarded additional damages to the Employees totaling $96,023.90. The judgment reflecting the jury's verdict was entered on April 28, 2006.

On May 2, 2006, Catapult filed a Motion for Judgment Notwithstanding the Verdict ("JNOV"). In the motion, Catapult

argued that none of the evidence at trial "can support a finding by the jury that Catapult lacked a good faith basis" to follow its unused leave policy. Catapult argued that the verdict "appears to be based on other evidence," specifically Mr. Wolf's and Mr. Matsuki's testimony that they were prevented from giving the appropriate notice. Catapult submitted that "evidence of relations between Catapult and its employees in the weeks leading up to the resignations is all completely beside the point" and irrelevant to whether there was a bona fide dispute between the parties. The only relevant point, Catapult argued, is that it had a good faith basis to believe that it would not violate the law by following the leave policy. Catapult argued that the Employees presented no evidence that Mr. Mulhall's conclusions about the legality of the policy were reached in bad faith.

The Employees filed an opposition to the motion. They argued that the evidence presented at trial showed that they were prevented by Catapult's actions from giving two weeks notice. They also argued that the evidence showed that the two weeks notice requirement was ambiguous. They asserted that the evidence presented at trial could cause "a reasonable jury" to have concluded that Catapult "lacked a good faith basis for withholding [the Employees'] accrued Universal Leave."

On June 13, 2006, the court denied the motion for JNOV. This timely filed appeal followed.

We shall include additional facts in our discussion, as necessary.

DISCUSSION

I.

Catapult argues that the court erred in granting the motion for partial summary judgment. "[S]ummary judgment is appropriate on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law." *Haas v. Lockheed Martin Corp.*, 396 Md. 469, 478 (2007) (internal quotation marks and citations omitted). "The question of whether a trial court's grant of summary judgment was proper is a question of law subject to *de novo* review on appeal." *Myers v. Kayhoe*, 391 Md. 188, 203 (2006). "Only when there is an absence of a genuine dispute of material fact will the appellate court determine whether the trial court was correct as a matter of law." *Dashiell v. Meeks*, 396 Md. 149, 163 (2006).

"An appellate court reviewing a summary judgment examines the same information from the record and determines the same issues of law as the trial court." *Haas*, 396 Md. at 478 (internal quotation marks and citations omitted). The Court must "review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party." *Myers*, 391 Md. at 203. Generally, "we review only

the grounds upon which the trial court relied in granting summary judgment." *River Walk Apartments, LLC v. Twigg*, 396 Md. 527, 541-42 (2007) (internal quotation marks and citations omitted).

Catapult does not take issue with the court's conclusion that there are no material facts in dispute. Catapult contends that the court committed legal error in concluding that the notice of resignation policy violates the WPCL. Catapult insists that its policy is consistent with Maryland's public policy.

Not surprisingly, the Employees respond that the court did not err in granting partial summary judgment in their favor. We agree with the Employees.

The WPCL is found in Title 3, Subtitle 5 of the Labor and Employment Article ("LE"). LE § 3-505 states: "Each employer shall pay an employee or the authorized representative of an employee all wages due for work that the employee performed before the termination of employment, on or before the day on which the employee would have been paid the wages if the employment had not been terminated." LE § 3-501 defines "wage" as follows:

> (c) *Wage.* — (1) "Wage" means all compensation that is due to an employee for employment.
>
> (2) "Wage" includes:
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> (i) a bonus;
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> (ii) a commission;
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> (iii) a fringe benefit; or

(iv) any other remuneration promised for service.

The court concluded that the unused accrued leave at issue in this case is a "fringe benefit" and therefore a "wage" under the WPCL. Consequently, the court reasoned, the Employees are entitled to be compensated for that wage in accordance with LE § 3-505.

Catapult does not challenge the court's finding that the unused accrued leave is a "fringe benefit." Rather, Catapult maintains that it was not obligated to compensate the Employees for their leave because the Employees did not give two weeks notice of resignation in accordance with its policy. Catapult maintains that Maryland law allows an employer's personnel policies to determine whether a departing employee may receive compensation for unused leave.

The Employees rely on the Court of Appeals' decision in *Medex v. McCabe*, *supra*, in support of their position that Catapult must compensate them for their unused leave. The court also relied on *Medex* in granting the motion for partial summary judgment. In that case, the Court of Appeals decided that an incentive payment qualified as a "wage" under LE § 3-501(c). 372 Md. at 32-33.

McCabe was employed by Medex. *Id.* at 33. The terms of McCabe's employment called for him to be paid "incentive fees." *Id.* Medex's employee manual stated that incentive payments were "conditional upon meeting targets and the participant being an employee at the end of the incentive plan (generally the fiscal

year) *and being employed at the time of actual payment.*" *Id.* McCabe resigned before payments on an incentive plan were due. *Id.* at 33-34. Medex refused to pay McCabe because he failed to satisfy the conditions of payment set forth in the employee manual. *Id.* at 34.

The Court of Appeals held that the incentive fees were "commissions" and therefore McCabe earned them as wages under the WPCL. *Id.* at 35-36. The Court emphasized that "it is the exchange of remuneration for the employee's work that is crucial to the determination that compensation constitutes a wage." *Id.* at 36.

The Court then considered the effect of the language in the employee manual limiting compensation of incentive fees to those who were still employed by Medex at the time of payment. *Id.* at 37. The Court noted that, under the common law, "such an employment contract provision would have been sufficient to deny the employee the incentive fees." *Id.* The Court recognized, however, that the intent of the General Assembly in enacting the WPCL "was to provide a vehicle for employees to collect, and an incentive for employers to pay, back wages." *Id.* at 39. (internal quotation marks and citations omitted).

The Court noted that, "[i]n accordance with the policy underlying the Maryland Act, an employee's right to compensation vests when the employee does everything required to earn the wages." *Id.* at 41. The Court recognized that, if Medex's policy

was to be upheld, its employees "necessarily will be incapable of receiving *some* portion of the incentive fees for the sales they made." *Id.* The Court continued: "A contract that necessitates the deprivation of some portion of the fees worked for by the employee contravenes the purpose of the Act." *Id.* The Court held that "[c]ontractual language between the parties cannot be used to eliminate the requirement and public policy that employees have a right to be compensated for their efforts." *Id.* at 39.

The case *sub judice* is analogous to the situation in *Medex*. The Employees doubtless "earned" their unused accrued leave in exchange for their work. The Employee Handbook states that Catapult's employees "earn" and "accrue" universal leave each pay period. Furthermore, an employee's rate of accrual decreases if an employee works less than forty hours per week, and employees in a "leave-without-pay status" for more than three days do not accrue universal leave during that period. And, if an employee leaves Catapult with a negative leave balance, the cost of that balance is deducted from the employee's final paycheck.

We conclude, as did the circuit court, that universal leave is given "in remuneration" for the employee's work and therefore constitutes a wage under the WPCL. Catapult's policy denies its employees compensation for the leave they have worked for and is therefore invalid, for the reasons stated in *Medex*. The policy cannot be used to contravene the requirement and public policy that

employees have a right to be compensated for their efforts.

Catapult attempts to distinguish *Medex* by reading it as standing only for the proposition that an employer's personnel policy cannot *necessarily* prevent an employee, upon termination, from receiving wages due to that employee. Catapult argues that its leave policy does not necessarily prevent its employees from receiving payment for all accrued unused leave upon termination of employment, because Catapult only withholds payment if the employee does not give two weeks notice of resignation. Consequently, Catapult claims, the policy does not conflict with *Medex*.

Catapult's attempted distinction of *Medex* is unpersuasive. The proposition in *Medex* to which Catapult refers was in response to Medex's argument that the contractual provision at issue in that case "does not conflict with the right to payment of wages, because the wages never became due." *Id.* at 41. Put another way, Medex had argued that no wage is earned without continuous employment as required by the policy. *Id.* The Court rejected that argument, noting that, "if Medex's plan is acceptable, then employees necessarily will be incapable of receiving *some* portion of the incentive fees for the sales they made." *Id.* Likewise, if Catapult's policy were acceptable, then its employees necessarily will be incapable of receiving compensation for the accrued leave they earned.

Catapult relies on two cases in support of its argument that

the ability of an employee to receive payment for unused leave is controlled by the employer's personnel policies. The first is *Rhoads v. Fed. Deposit Ins. Corp.*, 956 F. Supp. 1239 (D. Md. 1997), *rev'd on other grounds*, 257 F.3d 373 (4th Cir. 2001). In that case, the United States District Court for the District of Maryland held that an employee was not entitled to accrued vacation pay under the WPCL because her employer's personnel polices "clearly stated that employees terminated for cause were not due cash representing accrued vacation pay." *Id.* at 1259. In *Magee v. DanSources Technical Servs., Inc.*, 137 Md. App. 527 (2001), the second case on which Catapult relies, this Court held that whether an employer had a "policy of denial or a practice of payment" of unused vacation leave was a question of fact for the jury, thereby implying that a policy denying payment of unused vacation leave would be legal. *Id.* at 574-75.

Those cases are not instructive. First, *Rhoads* is a federal district court case and, of course, is not binding authority on this Court. In any event, both *Rhoads* and *Magee* were issued before *Medex*, which clearly held that an employer's personnel policies cannot be used to contravene the public policy that employees have a right to be compensated for their efforts.

Catapult also argues that its policy is consistent with Maryland's public policy. In support of that argument, Catapult cites Maryland's Division of Labor and Industry's guidance on its

website concerning unused vacation pay. The website apparently provided at one time:

> The answer to this question [whether employees can collect unused vacation leave] depends on the employer's policy, and whether this policy was communicated to the employee in advance. For example, if an employer informs employees at hiring that unused vacation leave will be lost or forfeited when employment ends, then an employee will probably not be able to claim it. On the other hand, *where no policy exists or was made known in advance to a terminated employee regarding forfeiture of accrued vacation, the employee may receive the cash value of whatever unused earned vacation leave was left -- provided it was otherwise usable.*

We cannot find that passage on the current version of the website. In any event, Maryland's Division of Labor and Industry's guidance is certainly not law.

In a similar vein, Catapult urges us to look to the Fiscal and Policy Note on HB 701, which was a bill defeated in 2006. The bill would have required employers to provide compensation for unused vacation leave or paid time off under specified circumstances. The Fiscal and Policy Note states that, in Maryland, the question as to whether an employer must pay an employee for vacation leave upon termination depends on the employer's policies. The note goes on to say: "In the Wage Payment and Collection Law (WPCL), wage means all compensation due an employee and includes any fringe benefit promised in exchange for service. Accrued vacation leave, which accumulates as an employee provides services, is then sometimes viewed as recoverable under WPCL." This note on proposed legislation is not law. Under *Medex*, Catapult's policy violates

the WPCL.

Two other cases on the subject were briefly addressed in the Employees' brief, *Whiting-Turner Contracting Co. v. Fitzpatrick*, 366 Md. 295 (2001), and *Stevenson v. Branch Banking and Trust Corp.*, 159 Md. App. 620 (2004). We too shall address those cases, equally briefly.

In *Whiting-Turner*, the Court of Appeals held that a bonus payment was not a "wage" under the WPCL, even though "bonus" is included in the definition of "wage" in the statute, because the bonus at issue was not "promised" by the employer. 366 Md. at 306. The Court stated:

> The conditions of employment are determined in advance of the employment. What, if anything beyond the basic salary, the employee will receive is a matter for discussion, consideration and agreement. . . . whether commissions are to be paid or what fringe benefits attach are matters for agreement in advance of the employment or to become a part of the undertaking during the employment. Once a bonus, commission or fringe benefit has been promised as a part of the compensation for service, the employee would be entitled to its enforcement as wages.

Id. at 305.

Whiting-Turner is distinguishable from the case before us. In the present case, the amount of accrued leave is related directly to the amount an employee works and is therefore promised for service. The bonus in *Whiting-Turner* is not similarly earned.

In *Stevenson*, we relied on both *Medex* and *Whiting-Turner* to conclude that, although severance pay is a wage under the WPCL, it

was not recoverable by the employee for the time she actually worked, because the severance pay was explicitly tied to the non-compete provision in the employment agreement. 159 Md. App. at 646-47. In other words, the severance pay was "explicitly a *quid pro quo*" for the non-compete agreement. *Id.* at 646. The severance pay was only promised "in exchange for the 23 months [the employee] agreed to refrain from competing with the bank, not for the 13 months she actually worked [there]." *Id.* The accrued leave in this case, however, is not a *quid pro quo* for complying with the notice of resignation policy.

We therefore hold that the court did not err in concluding that the policy violates the WPCL and granting the Employees' partial motion for summary judgment, accordingly.

II.

We next address Catapult's contention that, even if the court did not err in its judgment that Catapult's notice of resignation policy violates the WPCL, it erred in denying Catapult's motion for JNOV. In reviewing a decision to grant or deny a motion for JNOV, the standard is whether the decision was legally correct. *Shabazz v. Bob Evans Farms, Inc.*, 163 Md. App. 602, 643, *cert. denied*, 390 Md. 92 (2005). This Court "must view the evidence and the reasonable inferences therefrom in the light most favorable to [the nonmoving party]," in this case, the Employees. *Owens-Illinois, Inc. v. Hunter*, 162 Md. App. 385, 391, *cert. denied*, 388 Md. 674

(2005) (internal quotation marks and citations omitted). "[I]f there is any legally relevant and competent evidence, however slight, from which a rational mind could infer a fact in issue, then we must affirm the jury's verdict on that issue." *Id.* (internal quotation marks and citations omitted).

Catapult argues that the evidence, even if viewed in the light most favorable to the Employees, did not support the jury's verdict of no bona fide dispute between the parties. We agree.

In determining whether there is a bona fide dispute between the parties, the issue is "whether there was sufficient evidence adduced to permit a trier of fact to determine that [the employer] did not act in good faith" in withholding the compensation for accrued leave. *See Medex*, 372 Md. at 43 (quoting *Admiral Mortgage, Inc. v. Cooper*, 357 Md. 533, 543 (2000)). There was insufficient evidence presented in the present case to support the jury's finding that Catapult did not act in good faith in refusing to compensate the Employees for their unused accrued leave.

Paul Wolf and Peter Matsuki, two of the Employees, testified that due to Catapult's actions, they were unable to give the required two weeks notice of resignation. But, neither their testimony nor any other evidence they offered permits a finding that Catapult did not act in good faith. We agree with Catapult that its actions in the weeks leading up to the end of the contract are not relevant to whether there was a bona fide dispute between

the parties.

Nor did the Employees refute in any way Mr. Mulhall's testimony that he believed, based on his reading of *Medex* and other relevant cases, that Catapult's unused leave policy is consistent with Maryland law. The Employees contend that the jury was free to determine whether Mr. Mulhall was a credible witness. Even if the jury did not believe Mr. Mulhall's testimony, "[o]rdinarily disbelieving evidence is not the same thing as finding evidence to the contrary." *Larocca v. State*, 164 Md. App. 460, 485, *cert. denied*, 390 Md. 285 (2005) (quoting *Hayette v. State*, 199 Md. 140, 145 (1952)).

Because there was insufficient evidence to support the jury's finding of no bona fide dispute, we reverse that part of the judgment that awards the Employees treble damages.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART.

COSTS ARE TO BE PAID ONE HALF BY APPELLANT AND ONE HALF BY APPELLEES.