2019 IL App (4th) 180562-U

NOS. 4-18-0562, 4-18-0575 cons.

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Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

BILL JOHNSON, Plaintiff-Appellee, v. (No. 4-18-0562) ILLINOIS ALCOHOL & OTHER DRUG ABUSE PROFESSIONAL CERTIFICATION ASSOCIATION, INC., Defendant-Appellant.	Appeal from the Circuit Court of Sangamon County No. 12L78
BILL JOHNSON, Plaintiff-Appellant, v. (No. 4-18-0575) ILLINOIS ALCOHOL & OTHER DRUG ABUSE PROFESSIONAL CERTIFICATION ASSOCIATION, INC., Defendant-Appellee.	Honorable John W. Belz, Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Holder White and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed defendant's appeal, finding the trial court did not err in granting summary judgment in plaintiff's favor and awarding him damages and attorney fees. The appellate court also affirmed plaintiff's appeal, finding the trial court did not err in determining a reasonable hourly rate for plaintiff's attorney.

¶ 2 In March 2012, plaintiff, Bill Johnson, filed a three-count complaint against defendant, Illinois Alcohol & Other Drug Abuse Professional Certification Association, Inc. (Association), for, *inter alia*, breach of contract and violation of the Illinois Wage Payment and Collection Act (Wage Payment Act) (820 ILCS 115/1 *et seq.* (West 2012)). In 2016, both parties

moved for summary judgment, and the trial court granted Johnson's motion in its entirety. In December 2017, the court issued its order on damages. Thereafter, the court granted, in part, Johnson's petition for attorney fees.

¶ 3 In its appeal, the Association argues the trial court erred in (1) granting summary judgment in favor of Johnson, (2) awarding damages for unpaid vacation and sick days, (3) awarding an unpaid deferred compensation premium of $14,000 to Johnson, and (4) awarding attorney fees. In his appeal, Johnson argues the court erred in finding his attorney's reasonable hourly rate was $250 per hour instead of $325 per hour. We affirm both appeals.

¶ 4 I. BACKGROUND

¶ 5 A. Johnson's Employment with the Association

¶ 6 The Association is a private, not-for-profit organization that provides credentials and certifications for professionals in the fields of drug-and-alcohol abuse and mental-health counseling. Johnson served as executive director of the Association from June 1994 until 2010. He was named director emeritus in 2010 and remained in that position until he was terminated on April 1, 2011.

¶ 7 In 1999, Johnson and the Association entered into a deferred compensation agreement, whereby the Association's board agreed to continue his employment and he agreed to serve as the executive director until at least July 26, 2004. The agreement established an account to fund his deferred compensation and funds from that account would be used to pay the premium on a universal life insurance policy, which named Johnson as the insured and the Association as the beneficiary. The agreement also provided Johnson was to continue in his employment "subject to removal for cause or until otherwise terminated by either party by written notice to the other."

¶ 8 The Association hired Jessica Hayes to serve as its fiscal manager in 1998, and on July 1, 2009, she became its executive director. During this time, Johnson and Hayes were coworkers, and both worked for the Association's board, not each other. On August 27, 2009, Johnson, referring to himself as the chief executive officer (CEO), sent a letter to Hayes asking for the deferred compensation agreement to be extended until his retirement from the Association. The executive committee agreed to the extension.

¶ 9 On December 2, 2009, the Association held an executive committee meeting, and the committee voted and agreed on setting Johnson's retirement date as December 31, 2012. The executive committee also discussed Johnson's employment title and Dan Lustig, a member of the committee, suggested Johnson's title of CEO was "confusing to those trying to figure out where the 'buck stopped.' " The committee voted to create a new title for Johnson—director emeritus. In his position as director emeritus, Johnson worked for the board of directors.

¶ 10 The Association's policy and procedure guide requires employees to provide two weeks' written notice of resignation. On March 21, 2011, Hayes and Johnson engaged in an e-mail exchange in which Hayes believed he was bullying her. Hayes "called him to talk to him about that and have him stop sending bullying emails." According to Hayes, the phone line "was quiet for just a short period of time" before Johnson said, " 'Then I'm done working for you,' " and he would " 'not work for someone who thinks this way about [him].' " Johnson then said he would " 'have [his] check and [his] paperwork on Thursday.' "

¶ 11 Following the phone call, Hayes contacted executive committee member Dan Lustig and told him Johnson had verbally tendered his resignation. Later that day, Hayes sent an e-mail to Johnson in which she recalled his statement that he did not want to work for her and noted "that leads to a great deal of paperwork to be completed."

¶ 12 The following day, Johnson responded in an e-mail, noting he worked "for the Board" and would be submitting his letter of resignation to the board. He also stated he would not "work with anyone that makes false accusations" against his character. On March 23, 2011, Hayes e-mailed Johnson and said she had forwarded the March 22, 2011, e-mail, in which he stated his "intent to resign," to the executive committee. Johnson responded, noted he resented her sharing his personal correspondence with others, and said he would contact the executive committee directly. He also stated he "won't work with [Hayes] any longer."

¶ 13 Also on March 23, 2011, Johnson authored a letter to Hayes in which he inquired about his benefits and a severance. He described two letters between him and Gus Stieber, former president of the Association, regarding the conditions of his employment. Johnson assumed that when he left his employment in 2013, he would receive the vehicle he was driving and a "lump sum payment" as a severance.

¶ 14 On March 23, 2011, a special meeting of the executive committee was conducted by teleconference in which Valerie Arnett, Kellie Gage, Ginny Kich, and Dona Howell participated. Lustig was absent. The committee discussed Johnson's "tendered resignation on both March 21, 2011, verbally to Executive Director Jessica Hayes and on March 22, 2011 to Jessica Hayes via email." It was unanimously agreed that Johnson's resignation would be accepted effective immediately.

¶ 15 On March 24, 2011, Johnson wrote a letter to Arnett, the Association's president, in which he stated his statement of resignation "was said in a moment of anger" and resignation was not his intent. He suggested the possibility of continuing in his role as a consultant or working from home. Johnson asked to address the full board, if possible. In an affidavit, Johnson stated he never submitted a written letter of resignation to the board or anyone else.

¶ 16 On March 30, 2011, Arnett sent a letter to Johnson explaining it was "clear to the Executive Committee that the time has come to end [his] employment with the Association." In the absence of Johnson's resignation, the Association would terminate his employment. The letter proposed a severance package based on Johnson's resignation, effective April 1, 2011. Johnson would receive a lump-sum payment of $160,000 and title to the Association's vehicle that was in his possession. If Johnson did not accept the severance package, the letter indicated his "at-will employment with [the Association] remains terminated." Johnson did not resign or execute the proposed settlement agreement.

¶ 17 B. Johnson's Complaint

¶ 18 In March 2012, Johnson filed a three-count complaint at law against the Association. In count I, Johnson alleged a contract for employment existed between him and the Association and he performed his obligations under the contract by serving as director emeritus from 2009 until his termination on April 1, 2011. Johnson claimed the Association breached the agreement by terminating him, although it had a contract for a defined duration until December 31, 2012. Johnson also alleged the Association owed him $154,700 in salary from April 1, 2011, to December 31, 2012, $119,100 in deferred compensation, $12,677 in healthcare benefits, $105,300 in accumulated sick pay, $42,00 in vacation pay, and $17,493 for loss of an automobile supplied by the Association for his professional and personal use.

¶ 19 In count II, under the Wage Payment Act, Johnson alleged he demanded the various benefits owed him by the Association but the Association had not paid. Those benefits included vacation pay, sick pay, deferred compensation pay, and payment for healthcare benefits. Johnson also claimed the Association was liable for his attorney fees and other damages allowable under the Wage Payment Act.

¶ 20 In count III, Johnson alleged he received the termination letter via e-mail on March 30, 2011, at approximately 6 p.m. The following day, he attended an annual meeting pursuant to his role as director emeritus and was publicly recognized by the Association to the attendees. He continued performing his duties until April 1, 2011. Johnson alleged, by publicly recognizing him after he had been terminated, the Association intended to inflict emotional harm and distress on him. Because of this and other "outrageous actions," Johnson claimed the Association inflicted extreme emotional distress. The trial court ultimately dismissed count III with prejudice.

¶ 21 C. Summary Judgment

¶ 22 In June 2016, the Association filed a motion for summary judgment, claiming Johnson was an at-will employee and he could not maintain a claim for breach of contract because he orally told Hayes he resigned. Also, the Association argued the Wage Payment Act did not apply to Johnson's common law breach of contract claim or his claim for deferred compensation.

¶ 23 The following month, Johnson filed his motion for summary judgment. Johnson claimed he was entitled to judgment as a matter of law under the Wage Payment Act for his deferred compensation benefits and owed his accrued vacation and sick pay. Johnson argued he had an employment contract with the Association and claimed he did not resign his employment.

¶ 24 D. The Trial Court's Ruling on Summary Judgment

¶ 25 In December 2016, the trial court granted Johnson's motion for summary judgment in its entirety and denied the Association's motion in its entirety. The court found it undisputed that Johnson had not been paid his sick pay or his vacation pay and there was no genuine issue of material fact on Johnson's accrued vacation and sick pay. The court also found

the deferred compensation agreement called for $8000 per year of Johnson's salary to be directed into a fund and after a certain amount of time, Johnson would become vested and could withdraw the money. The court found it undisputed that Johnson was vested at the time of the separation of his employment.

¶ 26 The trial court also considered whether the Association breached its employment contract with Johnson by terminating him when he was under contract for a fixed duration. The court found the agreement to be of fixed duration and, as consideration, the Association received the guarantee that Johnson would not work past December 31, 2012. Further, Johnson's job duties materially changed as Hayes replaced him as executive director when he became director emeritus. Thus, the court concluded "a binding agreement was created for a fixed duration which means the contract was set for a specific time and was not terminable at will."

¶ 27 In deciding whether Johnson resigned or was terminated, the trial court stated it thoroughly reviewed the e-mails and found Johnson "never tendered his resignation" and "[a]t most, he referenced possibly doing so in a written statement to the Board at some point in the future." Further, the court stated the termination letter made no mention of Johnson ever offering to resign or the Association accepting his resignation. Instead, the Association referred to Johnson's job performance, "which would not be germane to a voluntary resignation." The court concluded no rational person could conclude Johnson resigned his employment and the Association terminated him in violation of the employment contract.

¶ 28 E. The Trial Court's Ruling on Damages

¶ 29 In August 2017, the trial court conducted an evidentiary hearing on damages following its summary judgment rulings. Johnson testified his base salary at the time of his termination was $88,000. As of January 1, 2011, Johnson stated he had accrued 180 sick days

and 120 vacation days. He later testified he took 2 or 3 sick days and had 172 or 173 remaining. He stated he contributed $8000 a year into his deferred compensation plan but he had not received any of that money.

¶ 30 Johnson acknowledged receiving a check from the Association for $79,000 in November 2011 and another one for $42,600 for vacation and sick pay. He did not cash the checks for fear of it constituting his intent to settle the case. From March 30, 2011, to December 31, 2012, Johnson claimed he was entitled to $12,677 for his healthcare benefits.

¶ 31 In October 2017, the trial court issued its written decision. In regard to the breach of contract in count I, the court awarded Johnson $93,183.93 in damages. As to Johnson's deferred compensation, the court found the Association had known it owed him benefits since March 30, 2011, but had failed to pay and Johnson had "been unable to access his own retirement money for well over six years." The court calculated the money owed to Johnson under the deferred compensation agreement to be $247,866.10, which included $96,830.52 as the cash surrender value and $151,055.58 in statutory interest. The court also found the Association was responsible for a deferred compensation premium of $14,000.07, or $666.67 per month, for the 21 months between March 23, 2011, and December 31, 2012.

¶ 32 In regard to Johnson's sick pay, the trial court found sick pay was a component of final compensation under the Wage Payment Act and the Association owed Johnson 171 days of accrued sick time as of the date of his termination. Thus, the court calculated the total dollar amount to be $148,466.07, which included $57,994.65 in sick pay and $90,471.42 in interest.

¶ 33 The trial court also found Johnson was entitled to 120 days of vacation pay amounting to $104,186.88, which included $40,698 in vacation pay and $63,488.88 in interest.

¶ 34 The trial court found insufficient evidence to award damages as to health insurance. The court calculated the total of all damages to be $607,723.05.

¶ 35 F. The Association's Motion to Vacate the Trial Court's Decisions

¶ 36 In October 2017, the Association filed a motion to vacate the trial court's December 2016 and October 2017 orders. The Association argued genuine issues of material fact precluded summary judgment on the question of whether an employment contract was formed and whether Johnson resigned or was terminated. The Association also argued the damages award was against the manifest weight of the evidence. In July 2018, the trial court denied the Association's motion.

¶ 37 G. Attorney Fees and Costs

¶ 38 In October 2017, Johnson filed a petition for attorney fees and costs. Johnson contended the $325 hourly rate of his attorney, Christopher Henson, was reasonable and below the market rate. Johnson claimed he was entitled to $253,172.76 in attorney fees and costs.

¶ 39 In July 2018, the trial court granted Johnson's petition in part. The court found the "matter has been litigated for over seven years, involving numerous, voluminous pleadings, a multitude of issues that had to be resolved through considerable research and legal arguments, and extensive discovery." The court found the rate of $250 per hour for Henson to be reasonable. Taking into consideration Henson's hourly rate and time spent on the case, along with that of other attorneys, a paralegal, and a researcher, the court entered judgment in Johnson's favor consisting of $202,557.38 in attorney fees and $5344.07 in costs. Both Johnson and the Association filed notices of appeal, and this court consolidated the cases.

¶ 40 II. ANALYSIS

¶ 41 A. Appeal No. 4-18-0562

¶ 42 1. *Summary Judgment*

¶ 43 "Summary judgment is appropriate where 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196, 201, 902 N.E.2d 645, 648 (2008) (quoting 735 ILCS 5/2-1005(c) (West 2000)). Where, as here, both sides filed motions for summary judgment, the parties "agree only a question of law is involved, and the court should decide the issue based on the record." *Farmers Automobile Insurance Ass'n v. Danner*, 2012 IL App (4th) 110461, ¶ 30, 967 N.E.2d 836. "However, the mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate a court to render summary judgment." *Pielet v. Pielet*, 2012 IL 112064, ¶ 28, 978 N.E.2d 1000. On appeal from a trial court's decision granting a motion for summary judgment, our review is *de novo*. *In re Application of Douglas County Treasurer*, 2014 IL App (4th) 130261, ¶ 23, 5 N.E.3d 214; *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163, 862 N.E.2d 985, 991 (2007).

¶ 44 a. Johnson's Employment Contract

¶ 45 The Association argues whether the parties agreed to form a contract which altered Johnson's status as an at-will employee remains disputed. We disagree.

¶ 46 "Generally, absent a contrary intention, an employment agreement without a fixed duration is terminable at will by either party." *Pokora v. Warehouse Direct, Inc.*, 322 Ill. App. 3d 870, 876, 751 N.E.2d 1204, 1209 (2001); see also *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill. 2d 482, 489, 505 N.E.2d 314, 317 (1987). Moreover, "a hiring at a monthly or annual salary, if no duration is specified, is considered to create an at-will employment relationship." *Pokora*, 322 Ill. App. 3d at 876, 751 N.E.2d at 1209. "An employee

bears the burden of overcoming the presumption of 'at will' employment by showing that the parties contracted otherwise." *Kiddy-Brown v. Blagojevich*, 408 F.3d 346, 363 (7th Cir. 2005).

¶ 47 In this case, Johnson became executive director of the Association in 1994. On December 2, 2009, the executive committee held a meeting to determine, *inter alia*, Johnson's retirement date. The meeting minutes indicate the committee considered a motion proposing "Johnson's last day of full-time employment" with the Association would be December 31, 2012. Further, "[i]t was made clear this date is not to be extended beyond December 31, 2012." The minutes indicate the motion carried. Johnson and the Association also entered into an agreement on September 23, 2010, in which he agreed to take 12 days off per month commencing January 1, 2011, and continuing through his retirement date of December 31, 2012, in lieu of payment for 180 accrued sick days. Thus, as the trial court found, an agreement existed between parties that included a specific, fixed duration. If this was an at-will arrangement, there would be no need to include a retirement date.

¶ 48 The Association also argues Johnson failed to identify new consideration sufficient to support a contract. "To state a cause of action for breach of contract, the plaintiff must allege facts establishing that the parties exchanged an offer, an acceptance, and consideration." *Mulvey v. Carl Sandburg High School*, 2016 IL App (1st) 151615, ¶ 29, 66 N.E.3d 507 (citing *Duldulao*, 115 Ill. 2d at 489, 505 N.E.2d at 318). Moreover, "[t]o form a valid contract between two parties, there must be mutual assent by the contracting parties on the essential terms and conditions of the subject about which they are contracting." *Reese v. Forsythe Mergers Group, Inc.*, 288 Ill. App. 3d 972, 979, 682 N.E.2d 208, 213 (1997).

¶ 49 "A modification of an existing contract, like a newly formed contract, requires consideration to be valid and enforceable." *Urban Sites of Chicago, LLC v. Crown Castle USA*,

2012 IL App (1st) 111880, ¶ 38, 979 N.E.2d 480; see also *Doyle v. Holy Cross Hospital*, 186 Ill. 2d 104, 112, 708 N.E.2d 1140, 1145 (1999). "Consideration must consist of something of detriment or disadvantage to one party or benefit to the other, and the bargained-for exchange between them." *Mulvey*, 2016 IL App (1st) 151615, ¶ 35, 66 N.E.3d 507.

¶ 50 Like the trial court, we find adequate consideration existed for the contract. The Association received the guarantee that Johnson would not work beyond December 31, 2012. In his July 2016 affidavit, Johnson stated he intended to work for the Association beyond December 31, 2012, but he reached the agreement where he "was legally obligated to cease working on that date." In her deposition, Arnett stated Johnson would have been in breach of the agreement if he had shown up for work on January 1, 2013. The court also found Johnson's job title and job duties materially changed as Hayes replaced him as executor director when he became director emeritus. Johnson's agreement to accept the title of director emeritus allowed Hayes to fully take over the director position in order to create a smooth transition and provide a definitive indication of who was in charge or, as Lustig stated, determine where the " 'buck stopped.' " Arnett testified Johnson's status as director emeritus rendered him a "consultant" for the Association. Johnson also agreed to take sick days and vacation days over the remainder of his term of employment to "lessen the burden on [the Association's] finances." The parties reaffirmed this agreement on September 23, 2010. "[A]s the adequacy of the consideration is within the exclusive domain of the parties to the contract, where a contract is entered into freely and without fraud, courts will presume that the consideration was adequate." *Chandra v. Chandra*, 2016 IL App (1st) 143858, ¶ 16, 53 N.E.3d 186. Here, both parties made concessions, and adequate consideration existed to form a valid agreement.

¶ 51 As a final argument, the Association contends a rational jury could find Johnson resigned. We find no basis to make such a conclusion.

¶ 52 On March 21, 2011, Johnson told Hayes he was "done working" for Hayes and he would "not for someone who thinks this way about [him]." In an e-mail on March 22, 2011, Johnson stated he would be submitting his letter of resignation to the board. On March 23, 2011, Hayes indicated she took it upon herself to forward Johnson's "intent to resign" to the executive committee. Johnson responded, indicating he resented Hayes sharing his personal correspondence and said he would contact the executive committee directly. The executive committee held a special meeting on March 23, 2011, to discuss "Johnson's tendered resignation on both March 21, 2011, verbally to Executive Director Jessica Hayes and on March 22, 2011 to Jessica Hayes via email." On March 24, 2011, Johnson e-mailed Arnett and stated he "was going to resign, which was said in a moment of anger and not something [he had] any intentions to do." In her March 30, 2011, letter on behalf of the Association, Arnett informed Johnson it was clear to the executive committee "that the time has come to end [his] employment with the Association" and the committee preferred "this separation be reached by way of a resignation and separation agreement."

¶ 53 The Association's policy and procedure guide required an employee to provide "two (2) weeks['] written notice of resignation." The Association cannot point to any written document indicating Johnson's actual resignation. Instead, the Association relies on telephone conversations and e-mail exchanges between Johnson and Hayes. Those conversations reveal Johnson clearly expressed his intention to no longer work with Hayes but said nothing about seeking to immediately terminate his employment with the Association. As the trial court found, at most, Johnson only referenced possibly tendering his resignation at some point in the future.

If all it took was a coworker's claim that a fellow employee stated his intention to resign, then the requirement for a written resignation would be rendered meaningless. Moreover, the Association's March 30, 2011, letter makes no reference to any resignation letter from Johnson and, instead, attempts to find a resolution. Had a letter of resignation been in effect, there would have been no need for such a resolution. We find the court did not err in finding Johnson did not resign but was terminated.

¶ 54 b. Damages for Unused Vacation and Sick Days

¶ 55 The Association argues the trial court's award of damages for unused vacation and sick days was unreasonable, arbitrary, not based on the evidence, and erroneous as a matter of law. We disagree.

¶ 56 When considering an award of damages, "the standard of review is whether the trial court's judgment is against the manifest weight of the evidence." *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 13, 996 N.E.2d 652. "A damage award is against the manifest weight of the evidence if the trial court ignores the evidence or the measure of damages is erroneous as a matter of law." *Amalgamated Bank of Chicago v. Kalmus & Associates, Inc.*, 318 Ill. App. 3d 648, 658, 741 N.E.2d 1078, 1085 (2000); see also *Kay v. Prolix Packaging, Inc.*, 2013 IL App (1st) 112455, ¶ 33, 993 N.E.2d 39.

¶ 57 In its award of damages, the trial court found the Association owed Johnson 171 days of accrued sick time as of the date of his termination. Thus, the court calculated the total dollar amount to be $148,466.07, which included $57,994.65 in sick pay and $90,471.42 in interest. The court also found Johnson was entitled to 120 days of vacation pay in the amount of $40,698 plus $63,488.88 in interest for a total of $104,186.88.

¶ 58 The Association argues it sent a check dated November 18, 2011, to Johnson for $76,392.85, for unused sick and vacation days and the trial court failed to credit the Association for that payment. Johnson acknowledged receiving the Association's check, which he believed was supposed to cover his vacation and sick pay. Johnson, however, did not agree with the amount, and he stated he "really didn't trust" the Association and was "afraid" if he signed the check, the Association would consider it a settlement of the entire case.

¶ 59 In its written order on damages, the trial court addressed the Association's argument relating to the check it sent to Johnson for unused sick days and accrued vacation days and stated as follows:

> "However, the amounts for vacation and sick time have been found to be insufficient by this Court. Further, [the Association] offers absolutely no evidence as to the circumstances surrounding this check. The only evidence in the record before the Court is that [the Association] sent [Johnson] a check which did not cover the amount owed for sick and vacation time, and that the check was never negotiated by [Johnson], meaning [the Association] had not 'paid' anything. Further, while [the Association] seems to question [Johnson's] decision to reject a check that did not cover what was owed, [the Association] did not put on any evidence whatsoever reflecting the circumstances surrounding [Johnson's] receipt of the check. Without any evidence before the Court, the Court cannot conclude anything else about the effects of the check beyond [Johnson's] testimony.

> It should be further noted that [the Association] expressly admits to violating the [Wage Payment Act] by not making any payment for sick or vacation pay for approximately 8 months. This delay alone accounts for over $10,000 in statutory interest. [The Association] offers no explanation as to why it should not be penalized under the statute for violating the statute.
>
> Finally, [Johnson] did not negotiate the check, so he never received the money. [Johnson] offered an explanation under oath that is plausible. Absent any other evidence, the Court can only rule based upon the admissible evidence contained in the record. The evidence conclusively shows the [Association] violated the [Wage Payment Act], and any defense based upon suppositions concerning the circumstances surrounding the check is insufficient as a matter of law."

¶ 60 In its brief, the Association bases its argument that the trial court erred on the $76,392.85 check, Johnson's paystub, and one page of Johnson's attorney's billing records. However, the Association has not pointed to anything that would justify a finding that the court's decision was against the manifest weight of the evidence or erroneous as a matter of law. The court found Johnson was entitled to $57,994.65 in sick pay and $40,698 in vacation pay, the sum of which is well above the $76,392.85 check. Thus, the Association's check did not even have the correct amount. Further, the court heard Johnson's testimony that he feared cashing the check would be taken as a settlement of the entire case, including amounts pertaining to his

deferred compensation. This was not an unreasonable or irrational fear, and the court found Johnson to be credible and his explanation to be plausible. We find no error.

¶ 61 c. Unpaid Deferred Compensation Premium

¶ 62 The Association argues the trial court's award of $14,000 to Johnson for the unpaid deferred compensation premium was an abuse of discretion. We disagree.

¶ 63 In its award of damages, the trial court noted the deferred compensation agreement required the Association pay $8000 per year into a universal life insurance policy while the agreement was in force. Beau Ingledue, the Association's insurance agent, testified the monthly premium payments of $666.67 were to continue to the end of Johnson's expected retirement date of December 31, 2012. At the time Johnson's employment ended on March 30, 2011, the cash surrender value of the policy was $96,830.52. The Association did not make payments to the account after March 23, 2011. The court found the Association was responsible for the payments due after March 23, 2011, until December 31, 2012. Accordingly, the court calculated the total to be $14,000.07, based on $666.67 per month for 21 months.

¶ 64 In its brief, the Association notes that, while a plaintiff may plead and prove multiple causes of action, he may obtain only one recovery for an injury. See *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 486, 693 N.E.2d 358, 371 (1998). The Association argues the trial court's award violates the election of remedies doctrine because Johnson sought recovery for deferred compensation pursuant to a breach of contract theory and pursuant to the Wage Payment Act. See *Kel-Keef Enterprises, Inc. v. Quality Components Corp.*, 316 Ill. App. 3d 998, 1008, 738 N.E.2d 524, 531 (2000) (stating the election of remedies doctrine is employed when double compensation is threatened). The Association contends that since Johnson chose to have his deferred compensation treated as final compensation as opposed to contract damages, he is

not entitled to the premium payments the Association presumably would have paid through December 31, 2012.

¶ 65 Here, the record reveals no threat of double recovery by Johnson. Johnson was vested in his retirement benefits at the time of his termination, which entitled him to payment as final compensation under the Wage Payment Act. However, the monthly premiums that were payable through December 31, 2012, were not due and subject to payment at the time his employment ended. Thus, these latter payments were not covered by the Wage Payment Act, and Johnson could seek to recover the amount in his breach of contract claim. The trial court found Johnson never argued the premium payments were covered by the Wage Payment Act, and the court did not analyze the premium payments under the Wage Payment Act. Instead, the court awarded the premium amount under the breach of contract claim, and we find it did not err in doing so.

¶ 66 d. Material Breach of Contract

¶ 67 The Association argues the trial court's finding of material breach of contract lacks evidentiary support and is contrary to existing Illinois law. We disagree.

¶ 68 " 'The issue of whether or not a breach of contract is "material," thereby discharging the other's duty to perform, is a question to be decided on the inherent justice of the matter ***.' " *Kel-Keef Enterprises*, 316 Ill. App. 3d at 1016, 738 N.E.2d at 537 (quoting *Susman v. Cypress Venture*, 187 Ill. App. 3d 312, 316, 543 N.E.2d 184, 187 (1989)).

> "Factors to consider in determining whether a breach is material include: (1) the extent to which the injured party will be deprived of the benefit that he or she reasonably expected; (2) the extent to which the injured party can be adequately compensated

> for the part of that benefit of which he or she will be deprived; (3) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (4) the likelihood that the party failing to perform or to offer to perform will cure his or her failure, taking account of all the circumstances, including any reasonable assurances; and (5) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing." *Commonwealth Edison Co. v. Elston Avenue Properties, LLC*, 2017 IL App (1st) 153228, ¶ 19, 76 N.E.3d 761.

"Because the determination of whether a breach is 'material' depends on the inherent justice of the matter and presents 'a complicated question of fact' involving consideration of several factors [citations], resolution of this issue is generally not appropriate at the summary judgment stage ***." *Wolfram Partnership, Ltd. v. LaSalle National Bank*, 328 Ill. App. 3d 207, 223, 765 N.E.2d 1012, 1025 (2001).

¶ 69 The Association contends the trial court did not find in its summary judgment order that the Association's failure to pay the deferred compensation amounted to a material breach of contract. Instead, the Association claims the court ruled in its order on damages that the Association was in material breach. The Association argues the court did not consider the *Commonwealth Edison* factors and barred testimony concerning liability at the prove-up hearing, both of which "unfairly prejudiced" the Association and prevented it from offering evidence or testimony on the question of whether it materially breached the deferred compensation agreement.

¶ 70 We find it abundantly clear the trial court found a material breach when granting summary judgment in favor of Johnson. It is hard to fathom what else Johnson could have been claiming when he filed his complaint against the Association. In his memorandum in support of his motion for summary judgment, Johnson cited *Francorp, Inc. v. Siebert*, 126 F. Supp. 2d 543 (N.D. Ill. 2000), in support of his claim of a material breach and pondered that "[t]o say that [the Association] has 'materially breached' its obligation under the contract (and the deferred compensation is a contract ***), is an understatement." The court found the Association elected not to respond to this argument until it filed its motion to vacate. The court also found as follows:

> "[The Association] made the decision as to when/how to respond to the argument. It is axiomatic that if a party is in material breach after wrongfully withholding payment for 14 weeks [as in *Francorp*], it follows that a Defendant who wrongfully withheld pay for over 6 years will also be found to be in material breach. [The Association] now contends that it was not afforded an opportunity at the damages hearing to prove the breach was not a material breach. *** It should be noted that counsel for [the Association] at no time expressed his intention to ask questions regarding a material breach, nor did he make an offer of proof. The matter is not properly before the Court. However, assuming, *arguendo*, it was before the Court, one cannot reasonably fathom any scenario in which a party who wrongfully withheld retirement money for over half a decade could not be found to be in material

> breach of a contract. [The Association's] actions in withholding [Johnson's] money in the instant case constitute a material breach as a matter of law."

As the court's finding of material breach finds support in the record, we find no error.

¶ 71 2. *Attorney Fees*

¶ 72 The Association argues the trial court's award of attorney fees was erroneous as a matter of law. We disagree.

¶ 73 " 'Illinois follows the "American Rule," which provides that absent statutory authority or a contractual agreement, each party must bear its own attorney fees and costs.' [Citation.]" *McNiff v. Mazda Motor of America, Inc.*, 384 Ill. App. 3d 401, 404, 892 N.E.2d 598, 602 (2008). If expressly authorized by statute, a court may award attorney fees and costs to a prevailing party so long as they are reasonable. *Career Concepts, Inc. v. Synergy*, 372 Ill. App. 3d 395, 405, 865 N.E.2d 385, 394 (2007). "A party can be considered a 'prevailing party' for purposes of a fee-shifting provision when it is successful on any significant issue in the action and achieves some benefit in bringing suit, when it receives a judgment in its favor, or when it achieves an affirmative recovery." *Med+Plus Neck & Back Pain Center, S.C. v. Noffsinger*, 311 Ill. App. 3d 853, 861, 726 N.E.2d 687, 694 (2000).

¶ 74 "A prevailing party may be entitled to all his or her attorney fees, even for unsuccessful claims, if those claims arise out of a common core of facts or legally related theories." *C.J. v. Department of Human Services*, 331 Ill. App. 3d 871, 892, 771 N.E.2d 539, 557 (2002). The United States Supreme Court discussed the doctrine surrounding the common core of facts or legally related theories as follows:

> "In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants *** counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.' [Citation.] ***
>
> *** In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 434-35 (1983).

"Where a plaintiff's claims of relief involve a common core of facts or are based on related legal theories, such that much of his attorney's time is devoted generally to the litigation as a whole, a fee award should not be reduced simply because all requested relief was not obtained." *Becovic v. City of Chicago*, 296 Ill. App. 3d 236, 242, 694 N.E.2d 1044, 1048 (1998).

¶ 75 "An award of attorney fees pursuant to a fee-shifting statute is reviewed for an abuse of discretion." *Robinson v. Point One Toyota, Evanston*, 2017 IL App (1st) 152114, ¶ 24,

77 N.E.3d 137. However, where the claim is the court misapplied the applicable law, our review is *de novo*. *Pietrzyk v. Oak Lawn Pavilion, Inc.*, 329 Ill. App. 3d 1043, 1047, 769 N.E.2d 134, 137 (2002).

¶ 76 The Association argues the trial court erred as a matter of law because Johnson's claim under the Wage Payment Act and his claims for breach of contract and intentional infliction of emotional distress did not arise out of a common core of operative facts as the facts and legal theories underlying these claims differed significantly.

¶ 77 In ruling on Johnson's petition for attorney fees, the trial court considered the common-core doctrine and found as follows:

> "[Johnson] initially had three causes of action in this case: intentional infliction of emotional distress, breach of contract and the [Wage Payment Act]. All of these claims involve a common set of operative facts and related legal theories. All causes of action include the termination of [Johnson], and the actions of [the Association] following the termination. Although [Johnson's] intentional infliction of emotional distress claim was dismissed, [Johnson] was successful on all of his other claims. Because all of the claims are legally related and stem from the same set of facts, work performed on [Johnson's] unsuccessful claim (IIED) should not be deducted."

¶ 78 We agree with the trial court. In this case, Johnson asserted multiple claims against the Association, all based on his employment with and termination by the Association. The claims involved a common set of operative facts and related legal theories. When Johnson

was wrongfully terminated, his breach of contract claim and Wage Payment Act claim gave rise to issues involving his deferred compensation, sick pay, and vacation pay. Even though Johnson was unsuccessful on his emotional distress claim, it was interrelated with his successful claims of breach of contract and under the Wage Payment Act. Thus, we find no error.

¶ 79 The Association also argues the fees Johnson's attorneys charged were neither reasonable nor necessary. A trial court has broad discretionary powers in awarding attorney fees—the exercise of which will not be overturned on appeal absent an abuse of discretion. *Bank of America v. WS Management, Inc.*, 2015 IL App (1st) 132551, ¶ 119, 33 N.E.3d 696. " 'An abuse of discretion occurs only when the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court.' " *Hjerpe v. Thoma*, 2017 IL App (4th) 160844, ¶ 28, 80 N.E.3d 872 (quoting *Seymour v. Collins*, 2015 IL 118432, ¶ 41, 39 N.E.3d 961).

¶ 80 In its brief, the Association (1) complains about a handful of motions, requests, and answers filed by Johnson's attorneys during the litigation; (2) claims his attorneys billed excessively for multiple hearings; and (3) contends the trial court erred in approving attorney Samuel Witsman's billing submission even though none of his time appeared to be devoted to Johnson's Wage Payment Act claim. The Association offers the conclusory claim that the court "chose not to" independently review the court file and "declined to consider the merits" of the Association's 56 pages of objections.

¶ 81 In the case *sub judice*, the trial court entered a 12-page order on Johnson's petition for attorney fees and costs. The court noted "[t]his matter has been litigated for over seven years, involving numerous, voluminous pleadings, a multitude of issues that had to be resolved through considerable research and legal arguments, and extensive discovery." The

court indicated it reviewed the billing entries in considering the Association's challenges to the time spent by Johnson's attorneys in prosecuting his claims and found those attorneys "had to engage in substantial work." The court also agreed with the Association on several claims, deducting time spent by attorney John Kendzior and time spent on Johnson's wife's case. With the exception of these last two deductions, the court found Johnson met his burden of showing his petition for attorney fees was reasonable and necessary.

¶ 82 In its brief, the Association points toward several instances where it believes Johnson's attorneys billed excessively, which amounts to approximately 74.9 hours of work, and asks this court to vacate the attorney fee award and remand the matter so the court can rule on its objections. In the alternative, the Association argues this court should sustain its objections and disallow 515.9 hours requested in one billing submission and 190.4 hours in another. We note the Association offers no case law in support on this specific claim, and it is not the job of this court to scour the record to find support for the Association's arguments. See *People ex rel. Illinois Department of Labor v. E.R.H. Enterprises, Inc.*, 2013 IL 115106, ¶ 56, 4 N.E.3d 1 (stating the appellate court "is not simply a depository into which a party may dump the burden of argument and research"). Given the court's thorough and well-reasoned order on attorney fees, along with the time spent by Johnson's attorneys engaged in this protracted legal battle, we find the Association has failed to show the court's order on attorney fees was an abuse of discretion.

¶ 83 B. Appeal No. 4-18-0575

¶ 84 Johnson argues the trial court erred in finding attorney Christopher Henson's reasonable hourly rate was $250 per hour instead of $325 per hour. We disagree.

¶ 85 Reasonable attorney fees are generally based on the prevailing market rate. *Palm*

v. 2800 Lake Shore Drive Condominium Ass'n, 2013 IL 110505, ¶ 51, 988 N.E.2d 75. "The best evidence of the market rate is the amount the attorney actually bills for similar work, but if that rate can't be determined, then the district court may rely on evidence of rates charged by similarly experienced attorneys in the community and evidence of rates set for the attorney in similar cases." *Montanez v. Simon*, 755 F.3d 547, 553 (7th Cir. 2014); see also *Stark v. PPM America, Inc.*, 354 F.3d 666, 674 (7th Cir. 2004) (stating the "market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the kind of work in question"). A trial court's award of attorney fees is reviewed under the abuse-of-discretion standard. *Palm*, 2013 IL 110505, ¶ 52, 988 N.E.2d 75.

¶ 86 In Johnson's October 2017 petition for attorney fees and costs, his attorney, Christopher Henson, sought $168,265.50 in legal fees, based on 517.74 hours billed at an hourly rate of $325. Henson stated the agreed-upon rate with Johnson was $325 per hour, and Johnson paid $250 per hour for all legal work in the case. The petition stated Henson had over 21 years of experience practicing law, with a specific emphasis in employment law.

¶ 87 In an affidavit, Henson stated his customary rate is between $300 and $400 per hour. Henson stated he and Johnson agreed to an hourly rate of $325 per hour and Henson "would prepare a fee petition at that rate if [Johnson] prevailed in this litigation." An attorney fee agreement submitted as exhibit H indicated the attorney fees charged by Henson's law firm would be $250 per hour. At the hearing on the petition, Henson argued courts "don't follow what the agreement is" but instead "follow what the value is."

¶ 88 In support of the petition, Elizabeth Hubbard, an attorney since 1974, submitted an affidavit. Based in Chicago, she handles employment discrimination matters and her hourly billing rate ranges between $400 and $600. After reviewing the trial court's decision and

discussing the matter with Henson, Hubbard opined Henson's $325-per-hour rate was "extremely reasonable and well within the market rate." Based on the court's summary judgment order, she also believed Henson's fees "may well have been significantly increased due to the longevity and complexity of this case and the nature of [the Association's] position."

¶ 89 In its order on the petition, the trial court indicated it considered "the skill and standing" of the attorneys that had worked for Johnson, "the nature of the case, the novelty and/or difficulty of the issues and work involved, the degree of responsibility involved, the usual and customary charges for comparable services, the benefit to the client, and the reasonable connection between the fees and the amount involved in the litigation." The court concluded the rate of $250 per hour for Henson was reasonable.

¶ 90 We find the trial court's decision was not an abuse of discretion. Although protracted in length, this was not an overly complex or novel case. It was a contractual dispute by an employee wronged by his employer that required him to utilize the Wage Payment Act to get what was rightfully owed him. Moreover, although it took several years to litigate, the case was decided on summary judgment. While Johnson presented Hubbard's affidavit, it gave the court minimal evidence upon which it could determine the rates charged by similarly experienced attorneys in the community of Sangamon County. In her deposition testimony, Hubbard could not provide the market rate for similar cases in Sangamon County, claiming "there are so many variables."

¶ 91 In response to Johnson's petition, the Association argued no market survey had been conducted to determine a reasonable rate. Johnson argues in his brief that "[t]aken to its logical conclusion, no prevailing plaintiff in [Wage Payment Act] cases in Sangamon County could ever receive more than the attorney fee agreement allowed, because no market survey

exists." However, nothing prevented Johnson from presenting evidence of the market rates for similar contractual disputes and employment litigation in Sangamon County, and we would not be going out on a limb to surmise the state capital of Springfield has its fair share of attorneys involved in similar litigation. Moreover, Johnson's repeated reliance on an unpublished federal district court decision offers little support in determining the prevailing market rate in Sangamon County. See *Lucas v. Taylor*, 349 Ill. App. 3d 995, 1002, 812 N.E.2d 72, 78 (2004) (stating "this court is not bound to follow federal district court decisions").

¶ 92 In its lengthy order, the trial court considered the evidence, the nature of the case, and Henson's skill and standing as an attorney. A rate of $250 per hour is no pittance, and nothing indicates that rate is unreasonable. See *Pickett v. Sheridan Health Care Center*, 664 F.3d 632, 640 (7th Cir. 2011) (stating if a party fails to satisfy his burden, the trial court "has the authority to make its own determination of a reasonable rate"). Given the lack of evidence on the prevailing market rate, we find the court's decision was not arbitrary, fanciful, unreasonable, or one that no reasonable person would take a similar view. Thus, we find no error.

¶ 93 III. CONCLUSION

¶ 94 For the reasons stated, we affirm the trial court's judgment in these two appeals.

¶ 95 Affirmed.