Circuit Court for Prince George's County
Case No. CAL 19-00569

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1154

September Term, 2020

EAST OVER CAR WASH, INC., *et al.*

v.

HERMEN NICOLAS PORTILLO CARBAJAL, *et al.*

Graeff,
Friedman,
Ripken,

JJ.

Opinion by Ripken, J.

Filed: February 18, 2022

Appellees, Hermen Nicolas Portillo Carbajal, Rafael Najera Lazaro, Nixon Jhonson Hernandez Rojas, Antoine E. Smith, and Marquett Johnson (collectively "the employees"), filed suit against their employers, appellants East Over Car Wash, Inc., and He Min Lee ("Lee") (collectively "East Over"). The employees alleged that East Over had not paid them the legal minimum wage, or time-and-a-half for overtime hours worked in excess of 40 per week, in violation of Maryland and Prince George's County employment laws. During the ensuing litigation, East Over failed to respond to the employees' discovery requests, prompting the employees to file a motion to compel, which was granted by the Circuit Court for Prince George's County. When East Over still did not respond to the discovery requests, the employees moved for sanctions for failure to comply with a court order and requested an entry of order of default.

The trial court entered an order of default against the employers and set an *ex parte* hearing on the issue of damages. East Over filed a motion to vacate the order of default, but it was untimely, and the trial court proceeded to the default hearing on damages. Following that *ex parte* hearing, the trial court made a determination as to the employees' damages and entered judgment.

On appeal, East Over contends that the trial court abused its discretion in failing to vacate the order of default against Lee. East Over avers that the court also abused its discretion when, as a discovery sanction, it declined to permit East Over to cross-examine the employees about their damages during the *ex parte* hearing. East Over further asserts that the trial court clearly erred in determining damages.

For the following reasons, we conclude there was no abuse of discretion or clear error on the part of the trial court, and we therefore shall affirm its judgments.

FACTUAL AND PROCEDURAL BACKGROUND

The employees filed their first amended complaint against East Over in the Circuit Court for Prince George's County on April 12, 2019.[1] Therein, the individual appellees, then current or former employees of the East Over Car Wash, Inc., solely owned and operated by Lee, alleged that they had been paid straight time, often at less than minimum wage, for all the hours they worked, even those hours in excess of 40 per week. They sought to recover damages pursuant to the Maryland Wage and Hour Law ("MWHL"), Md. Code, §§ 3-401, *et seq*., of the Labor and Employment Article ("LE"), the Prince George's County Minimum Wage Act, and the Maryland Wage Payment and Collection Law ("MWPCL"), LE §§ 3-501, *et seq*.[2]

On March 29, 2019, the employees propounded interrogatories and a request for production of documents directed to "Defendant East Over Car Wash, Inc." Those documents requested, among other things, information on the employees' work schedules

[1] The employees' initial complaint also listed Esther Lee, Lee's wife, as a defendant. She moved to dismiss the complaint against her, on the ground that Lee was the sole owner and operator of East Over Car Wash, Inc., but the circuit court ruled that the motion was moot after the employees filed their operative first amended complaint removing Lee's wife as a defendant.

[2] The MWHL and the MWPCL "allow employees to recover unlawfully withheld wages from their employer, and provide an employee with two avenues to do so." *Peters v. Early Healthcare Giver, Inc.*, 439 Md. 646, 653 (2014).

and wage structure. Responses to the discovery requests were due within 30 days. *See* Maryland Rules 2-421(b) and 2-422(c). On April 30, 2019, pursuant to a request for more time by East Over's attorney, the employees agreed to give East Over a two-week extension—until May 15, 2019—to provide discovery responses.

On May 23, 2019, the employees filed a motion to compel and for sanctions against "Defendant East Over Car Wash, Inc.," asserting that despite their good-faith efforts to work with East Over, East Over had not responded to emails or phone messages, nor requested a further extension, and had not provided discovery responses. Following a May 28, 2019, email inquiry by the court's clerk as to whether East Over intended to file a response to the motion to compel, East Over's attorney advised that he planned to file a response to the motion in "a timely manner" and to provide the discovery responses to the employees "shortly." East Over did not, however, file a response to the motion to compel or provide the discovery responses.

By order dated June 13, 2019, and entered June 14, 2019, the trial court granted the employees' motion to compel and ordered East Over Car Wash, Inc. to respond to discovery within ten calendar days. Failure to do so, the court warned, would permit the court to enter an order of default against East Over Car Wash, Inc.

On July 1, 2019, the employees filed a motion for sanctions for East Over's failure to comply with the court's order, asserting that "*Defendants'* failure and refusal to provide answers to Plaintiffs' First Set of Interrogatories and First Request for Production of Documents is in direct violation of the Court's June 11, 2019 Order" and requesting that the court "impose sanctions on *Defendants* by entering default against *them*." (emphasis

added).[3] Again, the court's clerk reminded East Over to file a response to the motion, but it did not do so.

By order dated July 24, 2019, and entered August 2, 2019, the trial court granted the employees' motion for sanctions, entered an order of default against East Over Car Wash, Inc. and Lee, and instructed the Office of Calendar Management to set the matter for hearing before any judge of the court.[4] The court permitted East Over Car Wash, Inc. and Lee 30 days to move to vacate the entry of default. It further stated that a motion to vacate "shall state the reasons for failure to plead and the legal and factual basis for defense to the claim."

East Over filed a motion to vacate the entry of default on October 2, 2019, approximately 61 days past the court's order of default. Therein, East Over claimed that it had not received the court's August 2, 2019, order and was unaware of the court-imposed discovery deadline. Counsel added that Lee had suffered "recent health issues" that "impacted his efforts in the collection of records responsive to [employees'] discovery requests," but that he (East Over's attorney) was prepared to "expeditiously provide responses" to the employees' discovery requests on behalf of both defendants "upon the vacating of the dismissal" against them.

[3] It appears that the employees mistakenly listed the court's order as dated June 11, 2019.

[4] The hearing was initially set for October 4, 2019. On October 3, 2019, the circuit court continued the hearing until after the court ruled on East Over's motion to vacate the default.

On October 4, 2019, the employees moved to strike East Over's motion to vacate and opposition to the order of default. They asserted that the motion to vacate was untimely, and that East Over did not request leave from the court to file the motion, therefore, the trial court did not have the authority to consider the motion to vacate. The employees also argued that East Over had failed to set forth legal and factual bases for the defense of their claim and failed to set forth any basis for the court to excuse their failure to comply with the court's order, as required by the order and Md. Rule 2-613(d).[5] As of the date of the filing of the motion to strike, East Over still had not provided responses to the employees' discovery requests.

On October 10, 2019, the trial court reserved ruling on the East Over's motion to vacate the entry of default and permitted it the opportunity to comply with outstanding discovery within seven days. Six days later, East Over Car Wash, Inc. provided the employees with answers to interrogatories signed by "He Min Lee, Director," as well as 622 unnumbered pages of documents. The employees responded with a notice of discovery deficiencies, based on the non-responsiveness of many of the discovery responses. The employees further requested that the court not vacate the default, and, instead, set a hearing on the issue of their damages.

East Over responded to the notice of deficiency, indicating that the 622 pages of discovery provided comprised all the documents in their possession that were responsive

[5] Rule 2-613(d) provides that, upon the entry of an order of default, a defendant "may move to vacate the order of default within 30 days after its entry. The motion shall state the reasons for the failure to plead and the legal and factual basis for the defense to the claim."

to the discovery requests. East Over also asserted that no discovery requests had been propounded specifically to Lee, and hence Lee individually, they contended, could not be deficient in his responses. East Over Car Wash, Inc. again requested that the order of default be vacated.

By order dated November 4, 2019, the trial court denied East Over's motion to vacate the default and set an *ex parte* hearing for the employees to prove damages. The *ex parte* hearing took place on January 10 and 22, 2020.

At the hearing, East Over initially requested permission to file another motion to vacate the default against Lee, personally. East Over argued that the discovery had been propounded on East Over Car Wash, Inc., and the discovery dispute therefore centered on the corporate entity, but the court also entered a default order against Lee. The employees responded that the motion was not timely because the court's order of default had been entered against both defendants, who were advised that a motion to vacate the default would be required within 30 days, and neither defendant timely filed a motion to vacate. Additionally, when East Over's motion to vacate the default was eventually filed, it did not raise the issue that East Over was attempting to raise in court for the first time. Therefore, the employees argued, Lee had waived the issue.

The trial court agreed that its order entered November 8, 2019, had denied Lee's motion to vacate the default, so the court had already ruled upon the issue. Therefore, the court concluded, it was not proper for reconsideration at that time.

Proceeding to the matter before it, the trial court explained that the hearing centered on "solely an issue on damages" following the entry of the order of default. As such, the

court advised East Over that it did not "have a role in this." The court therefore declined to permit East Over to cross-examine the employees and provide rebuttal evidence because permitting it to do so would render the court's earlier discovery sanctions moot.

The employees proceeded to provide testimony regarding their work schedules and pay received. The employees stated that the person who set their wages and hours was Lee, as owner and operator of East Over Car Wash, Inc. Employees testified that they worked approximately nine hours a day (with an unpaid 15 to 30 minutes for lunch, if the car wash was not busy), six to seven days a week at the car wash, with longer hours in the summer than in the winter.[6] All the employees agreed they were paid straight time for all hours worked, even those in excess of 40 in a week.

Following the employees' testimony, the trial court permitted East Over to make a brief argument. After, the court determined that the evidence was sufficient to show that East Over had paid the employees less than the minimum wage and had not properly compensated them for overtime. The court took the matter under advisement to make specific calculations of damages.

By order dated October 7, 2020, the trial court entered default judgment in favor of all the employees against East Over Car Wash, Inc. and Lee, jointly and severally, on the ground that the evidence sufficiently reflected that the employees had customarily worked well in excess of 40 hours per week but were compensated below the Prince George's County minimum wage and the required time-and-a-half for hours in excess of 40 per

[6] The employees acknowledged that they did not work during periods of inclement weather.

week. The court's contemporaneous memorandum opinion set forth the calculations of compensatory and exemplary damages the court awarded to each employee. The court also awarded attorneys' fees to the employees' lawyers, before closing the case.

On October 16, 2020, East Over filed a motion to alter or amend the judgment, arguing that the circuit court had not taken into account the fact that the car wash was closed on days of inclement weather and that it should have factored the weather-related closures into its calculation of damages to the employees. The court denied the motion on November 23, 2020. East Over timely filed a notice of appeal on December 4, 2020.

ISSUES PRESENTED FOR REVIEW

East Over presents three issues for our review:

I. Whether the circuit court abused its discretion by failing to vacate a Default against Defendant He Min Lee as a discovery sanction when no discovery was issued to him?

II. Whether the circuit court abused its discretion by failing to permit [East Over] to participate in the *ex parte* proof hearing, including the right to cross examine witnesses and make arguments?

III. Whether the circuit court failed to take judicial notice of facts that would impact the calculation of the judgment in this case despite indicating in open court that is exactly what the court would do?

As we shall explain, the circuit court did not abuse its discretion in declining to vacate a judgment against Lee, nor did it abuse its discretion in declining to permit East Over to cross examine employees during the *ex parte* hearing. Similarly, we perceive no error in the court's calculation of damages.

DISCUSSION

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING EAST OVER'S MOTION TO VACATE THE ORDER OF DEFAULT AGAINST LEE.

East Over argues that the trial court abused its discretion in denying their motion to vacate the order of default against Lee. The order of default, East Over asserts, was based on the failure to provide timely discovery responses, but, because the requests had been directed to East Over Car Wash, Inc., only, Lee could not have been held in default for violating the court's order compelling discovery that was not propounded upon him. The court's order, East Over concludes, deprived Lee of the opportunity to present evidence and participate in court hearings "in a meaningful manner," despite the lack of evidence that he breached a court order.

As this Court explained in *Sindler v. Litman*, 166 Md. App. 90, 122–23 (2005),

> Maryland law is well settled that trial courts have broad discretion to fashion a remedy based on a party's failure to abide by the rules of discovery. In order to impose sanctions, a court need not find willful or contumacious behavior. Rather, in imposing sanctions, a trial court has considerable latitude.
>
> Our review of the trial court's resolution of a discovery dispute is quite narrow; appellate courts are reluctant to second-guess the decision of a trial judge to impose sanctions for a failure of discovery. Accordingly, we may not reverse unless we find an abuse of discretion. In *Mason v. Wolfing*, 265 Md. 234, 236, 288 A.2d 880 (1972), the Court stated: "Even when the ultimate penalty of dismissing the case or entering a default judgment is invoked, it cannot be disturbed on appeal without a clear showing that [the trial judge's] discretion was abused."

(Internal citations and quotation marks omitted).

If the trial court enters an order of default, it also has broad discretion "to determine whether to grant or deny a motion to vacate [the] order of default." *Attorney Grievance*

Comm'n v. Alston, 428 Md. 650, 673 (2012) (citation omitted). *See also Das v. Das*, 133 Md. App. 1, 15 (2000) (ordinarily, we review a ruling concerning an order of default for abuse of discretion). The trial court's decision on that matter "will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Jenkins v. City of Coll. Park*, 379 Md. 142, 165 (2003) (citation omitted).

"One of the fundamental objectives of Maryland's broad and comprehensive discovery rules is to require disclosure of facts and thereby to eliminate, as far as possible, the necessity of any party going to trial while confused about the facts that gave rise to the litigation." *Billman v. State of Md. Deposit Ins. Fund Corp.*, 86 Md. App. 1, 12–13 (1991). To this end, upon motion by a discovering party, a trial court may impose immediate sanctions against the failing party if the court "finds a failure of discovery." Md. Rule 2-433(a). The court "may enter such orders in regard to the failure as are just," including:

> (1) [a]n order that the matters sought to be discovered, or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order;
> (2) [a]n order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; or
> (3) [a]n order striking out pleadings or parts thereof, or staying further proceeding until the discovery is provided, or dismissing the action or any part thereof, or entering a judgment by default that includes a determination as to liability and all relief sought by the moving party against the failing party if the court is satisfied that it has personal jurisdiction over that party.

Md. Rule 2-433(a). Furthermore, pursuant to Md. Rule 2-433(c), the trial court may impose similar sanctions for a failure "to obey an order compelling discovery." *A.A. v. Ab.D.*, 246 Md. App. 418, 442–43, *cert. denied*, 471 Md. 75 (2020) (citation omitted).[7]

In this case, East Over Car Wash, Inc.'s continued failure to respond to the employees' discovery requests, even after the court's order compelling it to do so, permitted the court to impose the sanction of an order of default against East Over, pursuant to Md. Rule 2-433(a) and (c). Then, pursuant to Md. Rule 2-613(d), East Over was permitted to move to vacate the order of default within 30 days of the court's July 24, 2019 order, stating "the reasons for the failure to plead and the legal and factual basis for the defense to the claim." East Over did not file a motion to vacate the order of default until October 2, 2019.

The failure to file a timely motion to vacate, in itself, justifies the trial court's denial of East Over's motion. *Attorney Grievance Comm'n v. Johnson*, 450 Md. 621, 638 (2016); *see also Banegura v. Taylor*, 312 Md. 609, 620 (1988) ("failure to comply with [Rule 2-613] may not deprive the trial judge of the right to grant the motion [to vacate the order of default], but it may furnish justification for the denial of it."). Thus, to affirm the judgment,

[7] In addition to its authority under the Maryland Rules to impose sanctions, a trial court also has the power to impose sanctions as part of the court's inherent power to control and supervise discovery. *Gallagher Evelius & Jones, LLP v. Joppa Drive-Thru, Inc.*, 195 Md. App. 583, 596 (2010) ("Even if . . . the precise action taken by the circuit court is not specifically prescribed by a rule or statute, the court has the ability, in general, to definitively and effectively [] administer and control discovery, as the Maryland Rules contemplate.") (internal citations and quotation marks omitted).

we need only observe that East Over did not file the motion to vacate until more than eight weeks after the deadline.

Even had the motion been timely, however, we would not conclude that the trial court abused its discretion in denying the motion. *See Carter v. Harris*, 312 Md. 371, 376–77 (1988) ("motions that fail to state the legal and factual basis for a defense on the merits, or that state no more than conclusory allegations concerning a defense, are inadequate, because they afford the court no real information upon which to make its finding."). Pursuant to Maryland Rule 2-613(d), a motion to vacate must disclose the legal and factual basis for the motion. East Over's motion contained nothing more than an incredible claim that it had not received the court's order entering the order of default and that Lee had "informed counsel of certain recent health issues which impacted his efforts in the collection of records responsive to [employees'] discovery requests."[8] The latter claim of "recent health issues" in October 2019 did not, of course, provide any reason why the discovery responses had not been timely sent to the employees when they were due in May 2019. Notably, East Over's untimely motion to vacate did not contain the explanation it now asserts on appeal—that Lee could not have been subject to the default order based on

[8] East Over asserts that it did not receive some court filings and correspondence because its attorney had provided the court with the incorrect suite number for his law firm's office. Although we do not base our decision on the validity or invalidity of that statement, we note that: counsel admittedly received numerous pieces of pertinent mail at his office; he "reasonably believed" that the court had his correct mailing address; and much of the pertinent correspondence was also relayed via email, either by the court or by opposing counsel. We also note that the failure to check the docket after declining to contest or respond to the May 23, 2019 motion to compel and then receiving the June 30, 2019 notice of a scheduled *ex parte* hearing is wholly unexplained.

the employees' motion to compel discovery because no discovery had been directed at him, individually.

Lee did raise that argument when he attempted to renew his motion to vacate the order of default at the start of the *ex parte* hearing on damages, but the trial court then declined to hear the motion on the ground that it had already been considered and denied on November 4, 2019. The court was thus not inclined to permit "multiple bites at the apple here."

Moreover, as the court noted, the order denying the motion to vacate had been entered more than two months earlier, so "[t]he revisory powers of the Court, once you get beyond 30 days, get narrower and narrower and narrower to the point where you really have to make an incredible *prima facie* showing of some kind of fraud, mistake, or one of the other categories that actually allow revisory [sic] beyond 30 days." Although the court's revisory powers in the case of fraud, mistake, or irregularity, pursuant to Maryland Rule 2-535(b), did not apply until the trial court entered its default judgment in compliance with Maryland Rule 2-613, *see Peay v. Barnett*, 236 Md. App. 306, 320–21 (2018), we presume that, in declining to hear the motion, the court was not persuaded that Lee had made such a *prima facie* showing.[9] For the foregoing reasons, we cannot say that the trial court abused its discretion in denying East Over's motion to vacate the order of default.

[9] Were we to consider the issue, we would not be persuaded by Lee's argument either. Although the employees' discovery requests stated in the title that they were directed at East Over, Inc., there is no dispute that Lee is the sole owner and operator of East Over, such that he would have been the only person with the knowledge to respond to the discovery requests; he admitted as much when he did answered the employees' (Continued)

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO PERMIT EAST OVER TO CROSS-EXAMINE THE EMPLOYEES DURING THE *EX PARTE* HEARING ON DAMAGES.

East Over next contends that the trial court abused its discretion in declining to permit it to cross-examine the witnesses at the *ex parte* hearing on the employees' damages. East Over argues that the trial court's order of default did not deprive it of the "opportunity to delve into the accuracy and truthfulness of the witnesses" through cross-examination, and the court's failure to allow the cross-examination "severely prejudiced" East Over in determining the honesty and accuracy of the witnesses' testimony. Acknowledging that an order of default can prohibit a defendant from presenting evidence, East Over concludes that "cross examination of a witness is not providing evidence but merely bringing forth information that the witness has for the court to truly understand the nature and extent of the case and any damages."

As we noted, trial courts are granted considerable latitude in crafting a remedy for a party's failure to abide by the rules of discovery, and we may reverse only if we find that the trial court abused its discretion in imposing its remedy. *Sindler,*166 Md. App. at 122–23. As sanctions for a discovery failure, Maryland Rule 2-433 (a) and (c) permits the trial court to enter an order "refusing to allow the failing party to support or oppose designated claims . . . or prohibiting that party from introducing designated matters in evidence," or an order "entering a judgment by default that includes a determination as to liability and

interrogatories stating that he, as the owner, was the only person who answered and supplied information used in answering the interrogatories. The practical result is that the discovery requests were directed to both East Over and Lee, so the order of default was properly entered against both parties, as the employers, for their failure to respond.

all relief sought by the moving party against the failing party if the court is satisfied that it has personal jurisdiction over that party." Additionally, if, in order for a trial court to enter a default judgment, it is "necessary to take an account or to determine the amount of damages," the court may conduct a hearing, as appropriate. Md. Rule 2-433(a)(3).

Discovery sanctions must be "proportionate to the discovery abuse." *Rodriguez v. Clarke*, 400 Md. 39, 69–70 (2007). In *Storetrax.com, Inc. v. Gurland*, 168 Md. App. 50, 92–93 (2006), *aff'd*, 397 Md. 37 (2007), after Storetrax failed to produce certain evidence requested during discovery, the trial court sanctioned Storetrax by prohibiting it from cross-examining a witness about the evidence that Storetrax failed to produce. We held there that the trial court did not abuse its discretion. *Id*. at 95. We hold similarly here.

The question in this matter was whether East Over failed to pay the employees the required minimum wage and extra wage for overtime in excess of 40 hours of work per week. Any information about the employees' rate of pay and hours worked each day and week was uniquely within the possession of East Over. *See, e.g.*, LE § 3-424 (requiring employers to keep such records for three years). But, East Over did not timely provide that information—which could have established the employees' damages—as requested in the employees' interrogatories and requests for production of documents. To permit East Over to then cross-examine the employees at the damages hearing would have served to reward East Over for its discovery violation. *See A.A. v. Ab. D.*, 246 Md. App. at 443 ("It is axiomatic that when a party willfully withholds documents, prospective witnesses' contact information, and other information requested by a discovering party, the court *may* bar the withholding party from introducing such evidence at trial." (emphasis in original)); *see*

also Rodriguez, 400 Md. at 68 (no abuse of discretion in precluding all of the defendant's expert witness testimony as a sanction for failure to comply with discovery).

To be sure, a trial court's complete prohibition of the defaulting party's participation in a damages hearing is an abuse of its discretion. *Fisher v. McCrary Crescent City, LLC*, 186 Md. App. 86, 135–36 (2009). We held in *Fisher*, however, that the defendant's failure to provide discovery justified an imposition of "harsh penalties" and explained that, upon remand, the trial court must "at the least, permit counsel to participate to preserve a record for further appellate review[.]" *Id*. at 136.

Here, the trial court adhered to that edict; although it did not permit East Over to cross-examine the employees as to their damages, it did permit East Over to observe and to make closing argument to preserve the record for appeal.[10] We cannot say that the trial court abused its discretion in declining to permit East Over to cross-examine the employees.

III. THE TRIAL COURT DID NOT CLEARLY ERR IN ITS CALCULATION OF DAMAGES.

Finally, East Over avers that the trial court clearly erred in determining damages, by failing to accept East Over's evidence of times the car wash was closed—and the employees therefore did not work—on days or partial days of inclement weather. The court's failure to reduce the employees' damages by the number of hours they did not work, East Over concludes, requires a remand for a recalculation of the employees' damages.

Maryland Rule 8-131(c) provides:

[10] The court also ensured that a Korean interpreter was on hand to assist Lee's understanding of the proceedings.

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

We review "the record for the presence of sufficient material evidence to support the [trial court's] findings" and "all evidence contained in an appellate record must be viewed in the light most favorable to the prevailing party below." *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996). The trial court's findings of fact "are not clearly erroneous as long as they are supported by any competent material evidence in the record." *Saxon Mortg. Servs., Inc. v. Harrison*, 186 Md. App. 228, 262 (2009).

In a wage and overtime action, an employee "has the burden of establishing the hours he claims to have worked and the work he claims to have performed for which he was not paid." *McLaughlin v. Murphy*, 436 F. Supp. 2d 732, 737 (D. Md. 2005), *aff'd*, 247 F. App'x 430 (4th Cir. 2007) (per curiam). If an employer does not keep records or fails to produce them in litigation, however, "an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). "The burden then shifts to the employer" to negate the reasonable inferences drawn from the employee's evidence. *Id.* at 687–88.

Because courts may award approximate damages to employees, employees need not "prove each hour of overtime work with unerring accuracy or certainty." *Pforr v. Food Lion, Inc.*, 851 F.2d 106, 108 (4th Cir. 1988). Rather, an employee can sustain his burden

by a "declaration asserting the average number of hours he worked." *Sanabria v. Cocody, Inc.*, No. DKC 16-0365, 2017 WL 3022990, at *4 (D.Md. July 17, 2017).

Here, the employees met their burden of establishing the average number of hours they worked. The employees testified that they generally worked six to seven days per week year-round at the car wash, usually more than eight hours per day, sometimes with an unpaid 30 minutes for lunch. They also testified about their compensation for the hours they worked and provided copies of paychecks or pay stubs, to the extent they maintained them. Those exhibits appeared to support the employees' claims that they were paid straight time, often at less than minimum wage, for all hours worked, even those in excess of 40 per week.

The trial court, after observing "the manner in which they testified," judged the employees' demeanor and found them to be generally credible. In the absence of records supplied by East Over to rebut their testimony, the trial court was permitted to award the employees approximate damages, based on their testimony and other evidence.

Furthermore, despite East Over's claim that the court ignored days or partial days the car wash was closed for inclement weather, it appears that the court did take that information into account in its calculation of damages. The employees did not dispute that they did not work during periods of inclement weather, and in closing argument, the employees' addressed that fact in summarizing each employee's testimony about the average number of hours worked per week, presenting the court "with a conservative estimate" for those hours and reducing the average number of hours worked "[t]o account for weather and things."

For example, in summarizing one employee's testimony, counsel for the employees explained that the employee generally had worked 59 hours a week for half the year and 68 hours a week for the other half, which averaged his work to 60 hours per week. Employees further assumed, to be "more than fair" to the defendants, that East Over had paid that employee for all 60 hours each week, even though they likely had not done so. Employees made similar conservative calculations for the other employees.

Then, in calculating damages based on the paystubs and paychecks the employees submitted into evidence, the court averaged the number of hours each employee worked per week, counting fewer hours in the fall/winter than in the spring/summer. The presentation of the average number of hours worked per week was sufficient to meet the employees' burden of establishing work for which they were improperly compensated. We are satisfied that the number of days or parts of days the car wash was likely closed due to inclement weather was sufficiently represented in the court's calculations.

Moreover, the "climatological observations of the weather" in the area of the car wash, of which East Over sought to have the court take judicial notice and accept into evidence, would have been of marginal assistance to the court in determining damages. Despite East Over's claim that the climatological charts indicated an average of 80 days of bad weather per year in the preceding three years in the Suitland area *near* the car wash, the charts did not provide specific amounts of rain, snow, or other inclement weather *at* the car wash, nor indicate how many days or hours the car wash was likely to have been closed as a result. Therefore, the court was not required to take judicial notice of the evidence East

Over sought to have admitted but the court was permitted to award approximate damages to the employees based on their testimony and exhibits.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.