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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Judge

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Appellate Case No. 2021-000266

Common Pleas Case No. 2020-CP-10-1819

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Troy Wilson, Appellant.

v.

Carolina Custom Painting & Drywall, LLC, and Jamie Singleton, Respondents.

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# FINAL BRIEF OF APPELLANT

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David A. Nauheim
NAUHEIM LAW OFFICE, LLC
101 Sycamore Ave.
Charleston, SC 29407
(843) 534-5084
Attorney for Appellant

TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases**



**Statutes**

## ARGUMENT IN REPLY TO BRIEF OF RESPONDENT

### I. Mr. Wilson raised with the trial court his argument that Respondents cannot assert a deduction from wages or a counterclaim be based on a course-of-dealings theory, and the trial court ruled on this issue in its Finding of Facts and Conclusions of Law. Therefore, this issue has been preserved for appeal.

In order to preserve issues and arguments for appeal, an appellant "generally must both present his issues and arguments to the lower court and obtain a ruling." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422 (S.C. 2000). In compliance with this rule, Mr. Wilson raised his course-of-dealings theory to the trial judge, and the trial addressed the course-of-dealings issue in his Findings of Fact and Conclusions of law. Therefore, the Mr. Wilson has preserved this issue for appeal.

Specifically, in Mr. Wilson's trial brief filed with the magistrate's court, he listed his course-of-dealing argument as one of the issues for trial. [R. 68.] He then the argued the theory extensively in his brief citing *Cato v. Mills* and other authority. [R. 74-75; R. 78-79.]

The trial judge then addressed the issue in his Findings of Fact and Conclusions of Law. First, he found in his findings of facts that there was a course of dealings where deductions would be taken from Plaintiff's payment for defective work:

> Further, there was a course of dealing where deductions would be taken from Plaintiffs payment for defective work. Singleton testified that at the initial hire of an employee, he would give all employees a written document that contained the following language " I understand that I am responsible for materials and labor of any faulty work discovered during inspection." Singleton testified Plaintiff received this document like all other employees. The course of dealing between Plaintiff and Defendants confirm that this was the deal. On March 30, 2015, Plaintiff signed a document that stated he would pay for damaged work: "I, Troy Wilson, a subcontract employee, agree to reimburse Carolina Custom Painting and Drywall $1,350.00 (one thousand three hundred fifty dollars) for damaged AC condenser

> at 27 Smith St. Payments of $150.00 will be deducted from my check weekly starting 3-27-15."

[R. 09.]

Then, in his conclusions of law, he based his decision to award Respondents their counter claim on his reasoning that an agreement for Mr. Wilson to pay for faulty work was formed through a course-of-dealings:

> Though I find Plaintiff to be an employee, the offset from his wages was legitimate. Plaintiff is responsible and accountable for the mistakes he made on the job. **The course of dealings between the parties** indicate that Plaintiff agreed to the terms as set forth in the document given to workers at the start of their employment, specifically that they would be "responsible for materials and labor on any faulty work." This is reaffirmed by the document of March 30, 2015. Plaintiff never contested this document and continued to work.

[R. 13.] Therefore, Mr. Wilson both raised the issue with the trial court and the trial court ruled on the issue; he has satisfied the preservation requirement.

Respondents argue that Mr. Wilson was required to move to alter or amend the judgement in the circuit court, because they claim that the circuit court did not reach the issue.[1]However, Mr. Wilson raised the issue in his appeal to the circuit court. [R. 74; R. 78-81.] And the circuit court considered this issue, because Judge McCoy's Amended Order states that she carefully "considered the arguments of counsel." [R. 20.]

But even if the circuit court had not reached the issue, that is not required when circuit court is the appeals court, not the trial court. The rule from the *I'On* case requires that the issue be raised before and decided by the trial court—*not* the court of appeals. *See I'On*, 338 S.C at 422.

[1] Mr. Wilson did raise the issue to the Circuit Court, and Respondents do not contend otherwise. [R. 78-81.]

There are two rationales behind requiring an appellant to obtain a ruling from the trial court in order to preserve an issue for appeal. First, the trial court is in the best position to properly rule on the issue, "after it has considered all relevant facts, law, and arguments." *See Id.* Second, imposing this rule at the trial court level is justified because the purpose of an appeal is to determine whether the *trial judge* acted erroneously or failed to act. *See Id.* (*citing Roche v. South Carolina Alcoholic Beverage Control Comm'n*, 263 S.C. 451, 211 S.E.2d 243 (1975)).

There is no authority—and Respondents have cited none—that an appellant must obtain a ruling on an issue from the circuit court when it is sitting as a court of appeals in order to preserve an issue for higher level appeal. Moreover, the rational that justifies this rule at the trial court level, does not apply to the circuit court when sitting as a court of appeals. This court is in just as good a position to review the trial court's decision as the circuit court, if not better. Thus, the rational that animates the preservation rule at the trial court level cannot be similarly justified at the circuit court level when sitting as a court of appeal. Requiring Mr. Wilson to file a motion to alter or amend the judgment would only needlessly prolong a process that has already taken nearly six years. The Court should find that Mr. Wilson has preserved this issue for appeal. If the Court disagrees, then then it should remand the case to the circuit court to make findings of fact and conclusions of law and all issues raised by the parties.

## II. The correct standard of review is that this Court may take its own view of the facts in reviewing the denial of treble damages and attorney's fees.

It is well established that in reviewing an award of treble damages, this Court "can take its own view of the facts." *Ross v. Ligand Pharm*, 371 S.C. 464, (S.C. Ct. App. 2006) (*citing O'Neal v. Intermedical Hospital*, 355 S.C. 499 (S.C. Ct. App. 2003)). Respondents

contend that “a ruling not to award treble damages is well within the discretion of the trial judge and cannot be disturbed on appeal.” But this Court has frequently reversed trial court decisions on treble damages based on its de novo interpretation of the facts.

Respondents conflate the standard for review of an action at law, with an action at equity. While a Payment of Wages Act claim sounds in law, the trial court’s decision to impose treble damages and attorneys fees sounds in equity. *See O'Neal v. Intermedical Hospital*, 355 S.C. 499, 509 (S.C. Ct. App. 2003). Therefore, the South Carolina constitution *requires* that this Court take its own view of the facts. *Id.; see also Father v. South Carolina Department of Social Services*, 353 S.C. 254, 260 (S.C. 2003) (*citing* S.C. Const. art. V, § 5). It is well established that this Court may take it own view of the facts when deciding the issue of treble damages and attorney’s fees. Not only do Respondents urge the wrong standard, but their argument throughout is faulty, because it is all based on the wrong legal standard.

**III. Respondents did not have a bona fide basis for withholding wages.**

As argued in in Appellant’s initial brief, when an employer’s reason for withholding wages is itself unlawful, it cannot be considered a “bona fide dispute.” Respondents do not rebut this argument. In fact, Respondents do not address *Cato v. Mills*, *Bennett v. Lambroukos* or S.C. Code §41-10-100 at all.

Respondents’ main argument is that the trial judge was within his discretion in finding that Respondents offered their defenses in good faith and that this Court cannot disturb this finding because it was within the discretion of the trial court. But that is not the correct standard for review.

The reason Respondents' give for withholding Mr. Wilson's wages was because of a deduction for faulty work. But Mr. Wilson was not provided written terms of employment allowing a deduction from wages for faulty work, which makes the deduction and thus Respondents'' reason for withholding wages *unlawful*. As a matter of law, withholding wages based on unlawful reason cannot constitute a "bona fide" dispute.

Respondents also argue that, the trial court also "declined to award treble damages and attorney' s fees because Employer tried to pay the wage and believed he had satisfied Wilson." But this is in irrelevant consideration. The decision whether to treble damages is based *solely* on whether the employer had a bona fide reason for withholding wages at the time.[2] Here, the employer willfully withheld wages for an unlawful and unjustified reason. They only attempted to pay *after* he contested an action by the labor board and lost (but never actually paid him). The Court should reverse the denial of treble damages and attorney's fees and remand to the circuit court to award treble damages and determine the reasonable attorney's fees.

## IV. There was no employment "contract" that allowed a deduction for wages for defective work.

Respondents argue that there was an "employment contract" between Mr. Wilson and Respondents that allowed for a deduction from wages for defective work. But there is no such contract. The trial judge did not find that there had been an "employment contract" and the theory has no support in the record.

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[2] The purpose of treble damages in the Payment of Wages Act is to incentivize employers to make *timely* payment. If an employer can avoid consequences by paying months later, *after* an employee has been forced to resort to filing a complaint with the Labor Board *and* then a citation has been issued, then the employer would be no worse off for violating the Act and the incentive for complying with the Act would be gone. Conduct rewarded is conduct repeated.

To prevail on this theory, respondents would have to show a manifestation of assent to the terms of a contract by Mr. Wilson. *Lampo v. Amedisys Holding*, LLC, 437 S.C. 236, 242 (S.C. Ct. App. 2022). Respondents point to a "writing," which they *claim* indicates that Mr. Wilson agreed to be responsible for faulty work. But that document—which is labelled POLICIES AND PROCEDURES"—*is not signed by Mr. Wilson*. [R. 88.] There is no evidence that Mr. Wilson ever even received copy of this document, much less manifested his assent to the terms.

The trial judge did *not* find that Mr. Wilson had signed a contract with Respondents. his assent to any contract. Rather, he found that "[t]he course of dealings between the parties indicate that Plaintiff agreed to the terms as set forth in the document given to workers at the start of their employment . . . [.]" [R. 13.]

But of course, the statutory requirement to that a deduction must be set forth in the written terms of employment cannot be obviated by a course of dealings.

And even if that were not so, a contract can only be accepted by performance when there is reasonable notice to the offeree that conduct equals acceptance. *Lampo*, 437 S.C. at 242. Here there was no evidence that Wilson was given notice of the terms of any contract of that his continued employment would manifest his assent.

Emphatically, it must be noted that there is *no evidence* that this "POLICIES AND PROCEDURES" document was ever provided to Mr. Wilson. The existence of the document does not establish that it was ever provided to Mr. Wilson. On the contrary, the Labor Board, despite being provided with this document, found that Mr. Wilson had *not* been provided written terms of employment. And the trial judge did *not* find that Mr. Wilson had provided written terms of employment.

Respondents contend that the document was "given to workers" at the start of their employment. But this is passive voice. There is no evidence in the record or finding by the trial court that this document was given to Mr. Wilson at the start of *his* employment with Respondents. Rather, the trial court relied on a course of dealings theory in lieu of finding an actual manifestation of assent.

Finally, Respondents reason that Mr. Wilson's alleged assent to being responsible for defective work is evidenced by a March 30, 2015 document he signed agreeing to pay Respondents for a damaged AC condenser. [R. 88.] But this was an agreement by Mr. Wilson only to pay for damage to *one* damaged AC condenser; it was not an agreement by Mr. Wilson to *future* deductions from wages his for defective work.

Respondents' argument that a deduction from wages or counterclaim was justified by an "employment contract" has no merit.

## V. Res Judicata

Mr. Wilson hereby waives his res judicata theory, which is not necessary for him to prevail on appeal.

## VI. Mr. Wilson has appealed Respondents' counter claim.

Respondents argue that Wilson did not appeal the trial court's award of Respondents count claim because he did not raise it on his issues on appeal or make the make the issue reasonably clear his arguments. However, Mr. Wilson listed "can the employer counter claim or offset based a course-of dealings-theory?" in his statement of issue on appeal in his initial brief. [*Initial Br.* at 1] He then argued the counter claim was barred by *Cato v. Mills*, *Bennett v. Lambroukos* and S.C. Code §41-10-100. [*Id.* at 20.]

Finally, he asked the Court to hold that Respondents may not assert counter claims for defective work. [*Id.* at 24.] Respondents' argument is without merit.

## CONCLUSION

For the foregoing reasons, this Court should hold that it was error to award Respondents' counter claim; that Respondents did not have bona fide reason for withholding wages; and that it was error to deny treble damages and attorney's fees. The Court should remand this matter the Circuit Court to award treble damages and a determination of attorney's fees and costs.

Respectfully submitted April 12, 2024

s/David A. Nauheim
David A. Nauheim
S.C. Bar No. 10283
101 Sycamore Ave.
Charleston, SC 29407
(843) 534-5084
Attorney for Appellant