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SC Court of Appeals

FINAL OPENING BRIEF OF APPELLANT

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 _____

Case No. 2020-CP-100-1819

_____

Troy Wilson, Appellant.

v.

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

_____

FINAL OPENING BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. When the South Carolina Payment of Wages Act (SCPWA) prohibits an employer from making a deduction for defective work because no notice of such deduction was given, can the employer counterclaim or set off for the same based on a course-of-dealings theory? **[NO]**

II. Whether res judicata prevents Respondents from re-litigating issues that have already been litigated with and decided by the South Carolina Department of Labor Licensing and Regulation and which were not appealed? **[YES]**

III. Treble damages and attorney's fees should be awarded when the employer did not have a good faith reason for withholding wages. Respondents withheld wages for a reason that is explicitly prohibited by the SCPWA. Can an unlawful reason for withholding wages be considered good faith reason? **[NO]**

STATEMENT OF THE CASE

Wage theft, the practice of employers failing to pay the full amount of wages legally due, is a widespread problem affecting millions of American workers, costing them billions of dollars annually.[1] This appeal concerns an all-too-common issue: an employer unjustifiably withholding the last paycheck.

The South Carolina Wage Payment Act, S.C. Code Ann. 41-10-10 et Seq., (2021) ("SCPWA") is remedial legislation that prohibits this kind of misconduct and provides a vehicle for employees to collect compensation wrongfully withheld. *Dumas v. InfoSafe Corp.*, 463 S.E.2d 641, 320 S.C. 188 (S.C. Ct. App. 1995). The SCWPA prohibits an employer from making deductions from wages unless notice of the deduction was given in the written terms of employment or posted conspicuously in the workplace. S.C. Code

[1] David Cooper and Teresa Kroeger, *Employers steal billions from workers' paychecks each year*, Economic Policy Institute (May 10, 2017).

§ 41-10-30. At this point, it is undisputed that the employer did not give notice of deductions and should not have withheld Mr. Wilson's final paycheck based on a deduction for alleged defective work.

But Respondents are nonetheless asserting the same deduction as a counterclaim or set off based on a course-of-dealings theory. However, this is prohibited by the text of the statute S.C. Code § 41-10-100 ("No provision of this chapter may be contravened or set aside by a private agreement.") It is also prohibited by long settled law, which holds that it violates public policy to allow course-of-dealings to modify the written terms of employment. *Cato v. Mills*, 129 S.E. 203, 132 S.C. 454 (S.C. 1925).

The rule urged by Respondents would allow employers to allocate the risk of business loss to their employees *without their notice or consent*. But the business owners' privilege of enjoying the profits comes with the risk of loss. An employer's sole remedy for defective work is to terminate the employee.

The magistrate's court awarded Appellant Troy Wilson his unpaid wages, but then offset this by a much a larger award in favor of Respondents for alleged defective work. There was no evidence that Mr. Wilson had done this work, but the magistrate held him accountable for it as a supervisor. This resulted in a net judgment for Respondents of $3,550.00. This was contrary to the SCPWA and *Cato v. Mills*.

In addition, the magistrate denied treble damages and attorney's fees on the basis that there had been a "bona fide dispute" about the wages due. But it would violate public policy and undermine the raison d'etre of the SCPWA to deny treble damages and attorney's fees when the employer's reason withholding wages is the very thing the SCPWA prohibits: a deduction from wages without lawful notice.

Mr. Wilson appealed the verdict to the circuit court, which affirmed without any reasoning. [R. 20-23.] And like that, a case over a week's unpaid wages is now before the Court of Appeals.

Unfortunately, both the recording of the magistrate's trial as well as the transcript of the circuit court appeal hearing have been lost. [R. 110-11.] While a new trial would be warranted under the circumstances, Mr. Wilson believes that the errors below can be corrected by this Court based on legal issue alone.

While the amount involved in this case is not large, the principle is important: The SCWPA will only protect workers from wage theft if courts will enforce it. Mr. Wilson therefore asks this Court to hold that Respondents' may not assert counter claims under a course-of-dealing theory, that Respondents' unlawful reason for withholding wages was not a "good faith dispute" as a matter of law, and for remand to the circuit court to award treble damages and a determination of attorney's fees and costs.

STANDARD OF REVIEW

"This court's standard of review of a circuit court's decision on an appeal from magistrate's court is limited to the correction of errors of law and this court will affirm the circuit court if there are any facts supporting its decision." *Walton v. Rock Hill*, 375 S.C. 562, 565, 657 S.E.2d 67 (S.C. Ct. App. 2007). However, when it comes to errors of law, this Court "retains de novo review of whether the facts show the circuit court's affirmance was controlled or affected by errors of law." *Bowers v. Thomas*, 373 S.C. 240, 245 (S.C. Ct. App. 2007). When reviewing a decision on treble damages, "this court can take it own view of the facts." *Ross v. Ligand Pharm., Inc.*, 371 S.C. 464, 471, 639 S.E.2d 460, 464 (Ct.App.2006).

FACTS

Factual Background

Respondent Carolina Custom Painting & Drywall, LLC is an LLC owned by Respondent Jamie Singleton ("Respondents"). [R. 29-30; R. 44-45.] Respondents provide painting and drywall services in the Charleston County area. [R. 29; R. 43.] Respondents hired Appellant Troy Wilson in 2015 to work as a painter and sheet rocker. [*See* R. 29; R43.] His hourly rate was $18.00 per hour. [*See* R. 36.[2]]

On or about October 10, 2017, there was a problem with paint peeling on a house that Respondents had recently painted that had not been sanded properly. [R. 29; R. 44.] Respondents blamed Mr. Wilson. [R. 7-8.] Mr. Wilson asserted that he not been at that job site the day it was sanded. [R. 7.] He further asserted that Respondent Jamie Singleton orally told him he was going to cut his pay $18 to $15. [R. 7.] The next day, Mr. Wilson resigned. [R. 29; R44.]

The next pay day was October 20, 2017. Respondents did not pay Mr. Wilson the $432.00 in wages that were due on that date. [R. 30; R. 9.[3]] The same day, Mr. Wilson made a complaint to the South Carolina Department of Labor, Licensing and Registration (SCDLLR). [R. 30; R. 9.] Respondents assert that they chose not to contest the action before the labor board. However, the SCDLLR file reflects that Mr. Singleton was interviewed by the investigator and provided documents in an attempt to persuade her

[2] While the Magistrate did not explicitly find that Appellant's hourly rate was $18 an hour, by awarding him $432 in unpaid wages, he accepted Appellant's position that Respondents owed him for 24 hours of work at $18 per hour, as the SCLLR investigation also found.

[3] The Respondents did not admit or deny paragraphs 13-29 of the Complaint.

that the deduction was justified by a course-of-dealings between Respondents and Mr. Wilson. [*See* R. 33-42]

The investigator sent Respondents a letter asking them, among other things, to provide any "written terms of employment." [R. 41.] Mr. Singleton was unable to do so. He provided a copy of Respondents' "Policies and Procedures," but there was no date on the document and it was not signed by Mr. Wilson. There was no evidence that these policies and procedures were posted conspicuously at or near the workplace or even existed at the time Respondents hired Mr. Wilson.

At conclusion of her investigation, the investigator made findings, including that "The respondent did not provide written terms of employment." [R. 36.][4] The SCDLLR found five violations of the Act including that Respondents had not provided Mr. Wilson with written terms of employment or given him notice of deductions from wages. [R. 35-36.] She issued a warning and $100 citation for failing to pay Mr. Wilson $432 on the scheduled payday. [R. 36.] Respondents chose to not appeal.

Respondents provided the investigator a copy of a money order made out to Mr. Wilson. Thus, she believed that he had been paid in full. [R. 36.] However, it is undisputed that Mr. Wilson never received the money order. Respondents allege they sent this to him by certified mail. However, it is undisputed Mr. Wilson did not receive the money order, that it was returned to Respondents, and that they made no further effort to pay him. [R. 10.] There is no dispute that to date, Respondents have still not paid Mr. Wilson the $432 in unpaid wages.

[4] Respondents also could also not produce this evidence in trial. Instead, they have relied on a course of dealings argument.

Section 41-10-50 provides a safe harbor to an employer who pays all wages due within 48 hours of the time of separation or the next regular payday. The next regular pay was 10/20/17. [R. 36.] According to the receipt in the SCDLLR file, the alleged tender of payment that Respondents made via certified mail was sent on November 8, 2017. [R. 10.] Thus, Respondents have not, and cannot argue the safe harbor provision of Section 41-10-50.

In an attempt to manufacture a "bona fide dispute," Respondents have argued that Mr. Wilson quit over a "dispute over wages." However, Mr. Wilson's resignation was *not* because of a dispute over unpaid wages; rather he resigned because Respondents cut his pay. [R. 29; R. 44.] The underlying dispute over unpaid wages arose *after* his resignation when Respondents refused to pay on the next payday, October 20th. It was that day that Mr. Wilson contacted SCDLLR. [R. 39.] At this point, it is undisputed that Respondents owed Mr. Wilson $432.00 (18$ x 24) for his last week's wages; that payment was due on October 20, 2017; and that Respondents did not pay him on this date. It is also undisputed the Respondents' reason for not paying Mr. Wilson was because of alleged "defective work" on the final job. [R. 9.][5]

Respondents' Answer to the Complaint asserted a counter claim against Mr. Wilson based on alleged "defective work." [R. 43.] The Answer alleged that Respondents hired Mr. Wilson as an "independent contractor" and that demanded payment for defective work pursuant to a "contractual arrangement" and course of dealings. [R. 43].

[5] It should be noted that the Magistrate's Findings of Fact and Conclusions of Law were drafted by Respondent and not handed down until 21 months after the trial, and without the benefit or a recording or transcript.

In trial, Respondents demanded a total of $3982 for alleged defective work at three different jobs. [R. 14.]

Mr. Wilson denied that he had done the alleged "defective work," or that he was even present on the job at the time. [R. 14.] Respondent Jamie Singleton was the only witness for the defense. [R. 7.] Mr. Singleton was not present when the alleged defective work was done. [R. 72.] There were multiple workers on that job and Mr. Singleton admitted that he had no personal knowledge of who had done the defective work. [R.72.] There was no evidence or testimony that Mr. Wilson had done this "defective work." But the magistrate decided to hold him accountable because Mr. Wilson admitted that he was the "supervisor" on these jobs. [R. 72.] No evidence of a "contractual arrangement" was presented.

Respondents treated Mr. Wilson and all of their employees as independent contractors. [R. 43; R. 7; R. 36.] It is fallacious that one independent contractor could be responsible for the work of another independent contractor. What is more, there was no notice given to Mr. Wilson that as a supervisor, Respondents would deduct from his wages for defective work done by other "employees" or independent contractors of Respondents—even if he was not present. Nor was there a course-of-dealings of Respondents deducting from Mr. Wilson's for defective work by other employees/independent contractors of Respondent. And there was no documentary evidence whatsoever admitted at trial to support the inflated amounts asserted by Respondents in the counter claims. [*See* R. 9.] Despite this, the Magistrate awarded Respondents' counterclaim explicitly based on a course of dealings theory.

Procedural History

This case was filed in the Magistrate's Court for the County of Charleston at No. 2018CV1011500709 on April 18, 2018 and tried before Magistrate Judge Jackson Seth Whipper on July 12, 2018. [R. 7.] At trial, the Plaintiff asked the magistrate's court to give preclusive effect to the findings of the SCDLLR. [R. 77.] This was denied.[6] Respondents conceded in opening statement that Mr. Wilson was in fact due his $432 in wages. [R. 71-72.] Mr. Wilson asked for directed verdict on this and Respondents' counter claims. [R. 9.] This was denied. The Plaintiff for an award of treble damages and attorneys' fees, and costs in the amount of $10,276.50. [R. 13.]

Magistrate Judge Whipper requested that the parties submit closing arguments in a post-trial brief, which was done. At that time, on or about July 31, 2018, a paralegal from Appellant's office requested a transcript or recording of the trial from the court. [R. 110.] She was told that the recording was on Judge Whipper's desk and could not be obtained until after he was done with the case. [R. 110.]

On March 19, 2020, a Transcript of Judgment was rendered by Judge Whipper finding against the Plaintiff and in favor of the Respondents in the amount of $3,550.00 on the counterclaim made during the trial. [R. 10] This was almost 20 months after trial.

Shortly after the judgment was handed down, Appellant again requested the recording of the trial to serve as the record for appeal. Despite earlier saying that it would remain with Judge Whipple until he finished the case, now the magistrate's court said it

[6] Despite this, the magistrate's findings were consistent with the SCDLLR findings, i.e. he directly or indirectly found that the SCPWA applied to Respondents; he did not find that Respondents had given Mr. Wilson written terms of employment give or notice of any deductions; he found that Mr. Wilson was due $432 in wages on October 20, 2017; that Respondents did not pay the wages due on that date; and that Respondents had mischaracterized Mr. Wilson as an independent contractor instead of an employee.

had been destroyed 90 days after trial. [R. 110.] Thus, the magistrate's transcript of judgment had been made 20 months after the trial without the benefit of a recording or transcript of trial.

On April 13, 2020, the Appellant timely filed a Notice of Appeal, and served the same on Judge Whipper and Respondents. The magistrate did not initially make a Return.

On June 19, 2020, Mr. Wilson also moved for new trial on the grounds that the recording of the magistrate's trial had been destroyed, that the Magistrate had not filed a return, and at this point, without a record to refresh his memory, it would be futile. The circuit court denied Plaintiff appeal and motion for new trial without prejudice and ordered the Magistrate file a return within 30 days.

On September 8, 2020, Judge Whipple handed down Findings of Fact and Conclusions of Law. This was nearly 23 months after the trial, and without the benefit of a recording or transcript. Indeed, what he signed was in actuality the verbatim proposed Findings of Fact and Conclusions of Law submitted by Respondents on June 19, 2020.

The circuit court held a hearing on December 8, 2020. It handed down a Form 4 Order on February 11, 2021 summarily affirming the magistrate's court without any reasoning. On February 16, 2021, the Circuit Court handed down an Amended Judgment affirming the Magistrate's court, again without any reasoning.

On March 10, 2021, Mr. Wilson filed a timely notice of appeal and served all parties. On March 18, 2021, the Appellant requested a transcript of the hearing before the circuit court from the court reporter. The court reporter did not respond or file the transcript. The undersigned later learned that the court reporter had retired and that the transcript could not be obtained. This Court ultimately remanded this case to the circuit

court for reconstruction of the record. On August 16, 2023, the circuit court signed a stipulated order which provided that the reconstructed record would consist of the documents that had been filed by the parties with the circuit court. Thereafter, this Court set a filing date for Appellant's initial brief.

ARGUMENT

The South Carolina Wage Payment Act

The Plaintiff brought this action under the South Carolina Wage Payment Act, S.C. Code Ann. § 41-10-10, et seq. (2021). The Act defines an employer to include every person, firm, partnership, association, corporation, receiver, or other officer of a court of this State, the State or any political subdivision thereof, and any agent or officer of the above classes employing any person in this State. *Id.* There is no dispute that the Act is applicable to Respondents.

Section 41-10-30 of the Act requires every employer to notify each employee in writing at the time of hiring of the normal hours and wages agreed upon, the time and place of payment, and the *deductions* which will be made from the wages:

> Every employer shall notify each employee *in writing* at the time of hiring of the normal hours and wages agreed upon, the time and place of payment, and the *deductions which will be made from the wages*, including payments to insurance programs. The employer has the option of giving written notification by posting the terms conspicuously at or near the place of work. Any changes in these terms must be made in writing at least seven calendar days before they become effective. This section does not apply to wage increases.

Id. (emphasis added).

Section 41-40-10 (D) of the Act requires every employer in the State *to pay all wages due at the time and place designated* as required by subsection (A) of Section 41-10-30.

Section 41-10-50 of the Act requires that:

> [W]hen an employer separates an employee from the payroll for any reason, the *employer shall pay all wages due to the employee within forty-eight hours of the time of separation or the next regular payday which may not exceed thirty days.*"

Id. (emphasis added).

Under Section 41-10-60 of the Act, when there is a dispute over wages, the employer shall give written notice to the employee of the amount of wages which he concedes to be due and shall pay the amount *without condition* within the time set by this chapter.

Under Section 41-10-80 (C) of the Act, the employer's failure to pay wages allows the employee to recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow.

Under Section 41-10-100 of the Act, there can be no "private agreements" that contravene or set aside any provision of the Act.

And most relevant to the appeal, Section 41-10-40(C) states:

> An employer *shall not withhold or divert any portion of an employee's wages unless . . . the employer has given written notification to the employee of the amount and terms of the deductions* as required by subsection (A) of Section 41-10-30.

Id. (emphasis added.)

An agent of the company who knowingly violates the act is liable in his or her individual capacity and is a proper party in addition to company. *Dumas v. InfoSafe Corp.*, 463 S.E.2d 641, 320 S.C. 188 (Ct. App. 1995). This makes Mr. Singleton a proper party in addition to the LLC.

I. Mr. Wilson had a statutory right under the SCPWA to be protected from deductions from wages that were not included in the written terms of employment. This cannot be waived under a private agreement or a course-of-dealings theory.

The Magistrate did *not* find that Respondents had given Mr. Wilson notice of a deduction for "defective work" or that a deduction was somehow allowed under the SCPWA. Rather, the magistrate awarded Respondents $3982 "for their set offs and counter claims" for "defective work," based solely on a course-of-dealings theory. [R. 9.] "there was a course of dealing where deductions would be taken from Plaintiff's payment for defective work."] This was an error of law that is contrary to section 41-10-100 as well as *Cato v. Mills*, 129 S.E. 203, 132 S.C. 454 (S.C. 1925) and progeny.

Cato v. Mills dealt with a predecessor to the SCPWA, which provided that whenever a corporation discharged a laborer, "the wages which have been earned by the discharged laborer shall become immediately due and payable." *Id.* at 204.[7] The court reasoned that when Cato was hired, that statute formed part of the contract. *Id.* at 203. Yet when Cato was discharged, Mills refused to pay him his wages due until he vacated housing that had been provided to him by the corporation. *Id.*

Like here, Mills contended that Cato agreed to waive this right when he accepted employment, because "this practice is a well-understood and universal custom or usage with this defendant." The court rejected this argument, holding that it was against public policy to impliedly waive or contract away his rights under the statute. *Id.*

The court reasoned that parties are permitted to make law for themselves only in cases where their agreement does not violate the express provisions of any law[.]" *Id.* (quoting authority). The court's reasoning is very pertinent to this case:

> At the time of the passage of this act corporations discharged their impecunious employees, no doubt, in many cases, with large families, who had nowhere to go

[7] *See Dumas v. Infosafe Corp*., 320 S.C. 188, 194 n.3 (S.C. Ct. App. 1995) (explaining that Act No. 944, 1938 S.C. Acts 1886 was the predecessor to the Payment of Wages Act.)

> and no means with which to defray their expenses while seeking other employment. They were, under the custom mentioned, compelled to wait until pay day for their wages. In the meantime expenses were mounting, and the situation of the laborer became more precarious each day. The statute in question was passed to remedy this state of affairs. Now, *if the object of the statute can be thwarted by custom or contract, then the statute might as well be repealed*, because it will not be long before the owner of every factory, mill, or other corporation employing labor, subject to the provisions of the statute, will establish customs and enter into contracts that will completely nullify the statute.

Id. at 205 (emphasis added). Like in *Cato* Respondents cannot abrogate Mr. Wilson's rights under the SCPWA based on course-of-dealings theory. To hold otherwise would create a slippery slope that would make the SCPWA a nullity.

Cato v. Mills is alive and well. It was cited by the South Carolina Supreme Court for these very principles in *Futch v. McAllister Towing of Georgetown*, 335 S.C. 598, 605, 518 S.E.2d 591 (S.C. 1999). And more recently, these principles were reiterated by the Court of Appeals in *Ross v. Ligand Pharm*, 371 S.C. 464, 473 n. 1 (S.C. Ct. App. 2006) ("our courts 'refuse to allow employers to ignore the [WPA] by claiming their employees had by contract or custom waived their statutory right to prompt payment of wages.' ")

Cato v. Mills is instructive for a second reason as well. The concurring opinion explains that Mills' duty to pay Cato his wages upon discharge, was a separate and distinct obligation from Cato's obligation to vacate the house. *Id.* at 206 (Marion, J. concurring). Judge Marion reasoned that the obligation under the statute was to pay the wages due "immediately." *Id*. This was a mandatory obligation by statute. *Id.* Therefore, Mills could not refuse to perform this obligation until Cato performed a separate obligation to vacate the house. *See also* S.C. Code § 41-10-60 ("[T]he employer shall give written notice to the employee of the amount of wages which he concedes to be due and shall pay the amount *without condition* within the time set by this chapter.")

Similarly, here Respondents' obligation under the statute was to pay the wages due on the next regular payday "without condition." Any claim for defective work by Respondents against Mr. Wilson needed to be handled separately. As Judge Marion reasoned, "It is an elementary and fundamental principle of law that no person can by contract relieve himself of a duty which he owes to the public independently of the contract." *Id.*

The holding of *Cato v. Mills* was codified in section 41-10-100 of the statute which provides, "No provision of this chapter may be contravened or set aside by a private agreement." Therefore, under both *Cato v. Mills* and section 41-10-100, it was an error of law to allow Respondents to counterclaim or setoff under a course-of-dealing theory.

This rule does not prevent an employer from asserting valid defenses or counterclaims. *Futch*, 335 S.C. at 605. For example, an employer can bring a counter claim for a breach of the common law duty of loyalty to an employee, which forfeits the right to compensation. *Id.* But a cause of action for "defective work," only exists between a general contractor and subcontractor. *See Quality Lawn Care & Landscaping, Inc. v. Coogler Constr. Co.*, Appellate No. 2018-001156, at *1 (S.C. Ct. App. June 2, 2021) ("Generally, a subcontractor is liable to the contractor for the contractor's cost of correcting the subcontractor's defective work") (quoting 17 *S.C. Jur. Construction Law* § 9 (1993). This cause of action arises out of breach of contract theory and allows for consequential damages. *See Id.* But Respondents did not assert a breach of contract claim, much less establish the existence of a binding contractor-subcontractor contract or relationship between the parties from which consequential damages could be claimed.

This brings Respondents back to square one: Mr. Wilson's statutory rights under the SCPWA cannot be abrogated by "universal custom or usage with this defendant." There is no interpretation of the facts that would sustain the counterclaims or offset asserted by Respondents.

In addition, the holding of *Bennett v. Lambroukos*, 303 S.C. 481, 483, 401 S.E.2d 428 (Ct. App. 1991) also forecloses the ruling of the magistrate. In that case, Lambroukos employed Bennett as a dishwasher. When Bennett was terminated, Lambroukos made a deduction from her last paycheck based on a deduction for "breakage." Lambroukos claimed that Bennett had signed a "contract" that included a deduction for wages. But the court of appeals found that the record indicated that "Bennett was not notified at the time and place of hiring of a deduction for breakage." *Id.* at 483.

The magistrate held that Bennett was entitled to the full amount of her wages without a deduction and awarded treble damages and attorney's fees. The circuit Court reversed on the basis that the SCPWA did not apply. The court of appeals reversed the circuit court, and found that it was error for the circuit court to allow for a deduction for breakage. The court of appeals also held that the magistrate did not err by trebling the damages because "of the factual findings that Lambroukos violated the statutory provisions." *Id.* at 484. *Bennett v. Lambroukos* is on all fours with this case. Under *Bennett*, *Cato v. Mills*, and section 41-10-100, the circuit court should be reversed.

II. Res Judicata prevents Respondents from relitigating issues that were already decided by the SCDLLR and not appealed.

The trial court erred by not giving preclusive effect to the findings of the SCDLLR investigation. The magistrate refused to give preclusive effect to these finding, and Mr. Wilson preserved this error in his appeal to the circuit court. [R. 76-78.]

Ordinarily, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action. *Bennett v. South Carolina Dep't of Corrections*, 305 S.C. 310, 408 S.E.2d 230 (1991). In *Bennett*, our Supreme Court stated: "This Court has repeatedly held that, under the doctrines of *res judicata* and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action." The party asserting preclusive effect must show that the issue was (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *Carolina Renewal, Inc. v. S.C. Dep't of Transp*., 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009).

Here, all three elements are shown. Respondents claim that Singleton "did not contest the Matter before the labor board[.]" But as demonstrated by the SCDLLR record, SCDLLR interviewed Respondent Singleton, and Mr. Singleton provided documents to the investigator in attempt to persuade her of his position. [R. 33-42.]

Respondents also claim that he did not appeal because he "believed his decision to send the check would end the matter." Respondents subjective reason for not appealing is irrelevant to whether the doctrine of *res judicata* applies.[8] As shown in the Magistrate's Return, the Appellant admitted the SCDLLR letter, findings and citation into evidence in trial. [R. 9.] They were also an exhibit to the Complaint. [R. 33-42.] These documents demonstrate that Respondents had actually litigated with the SCLLR the issue of whether:

[8] If Respondents had paid Mr. Wilson, it would have ended the matter. But they did not—and thus could not have expected the dispute to end without payment.

- Mr. Wilson had been misclassified by Respondents as an independent contractor and was in fact an employee;
- Mr. Wilson was owed $432 by Respondents no later than his final payday;
- Respondents failed to pay Mr. Wilson the wage due at his next regular payday;
- Respondents failed to provide written notice of the terms of employment;
- Respondents failed to provide written notice of any deductions from wages.

[R. 33-42.]

The SCDLLR directly determined these issues and these findings were necessary to the citation it issued. The SCDLLR found five violations and cited Respondents for failing to pay $432 in unpaid wages. The SCDLLR's ruling was supported by detailed findings of fact. The Appellant asked the magistrate to give all of five findings of the SCLLR preclusive effect.

In *Keiger v. Citgo, Coastal Petroleum, Inc.*, the trial court granted summary judgment on the Plaintiff's Payment of Wages claim on the grounds that "Respondents had paid Keiger the amount the South Carolina Department of Labor determined she was due, and because she had not appealed that determination, she was barred from relitigating it." 482 S.E.2d 792, 326 S.C. 369, 327 n. 3 (Ct. App. 1997) (overruled on other grounds by *Hall v. UBS Fin. Servs*., 435 S.C. 75 (S.C. 2021). Likewise, the Magistrate should have given the SCDLLR findings preclusive effect. The failure to do so was contrary to the law and should be reversed. This Court should find that the five findings of the SCDLLR have preclusive effect that Respondents owed Mr. Wilson $432 in wages; that Respondents did not pay Mr. Wilson the wages due on the scheduled payday of

October 20, 2017; that Respondents did not provide Mr. Wilson written terms of employment; and that Respondents did not provide Mr. Wilson notice of any deductions from wages; and that Mr. Wilson was an employee and Respondents had misclassified him as an independent contractor. This Court should further find that it was an error of law from the circuit court to affirm the magistrate's court's error.

IV. The reason given by Respondent for withholding Mr. Wilson's wages violates the SCPWA and cannot therefore constitute a "good faith dispute" about whether wages are due.

The reason Respondents gave for withholding Mr. Wilson's final paycheck was because of a deduction for alleged "defective work" at 1108 Ocean Club job. [R. 7-8.] On that basis, the Magistrate found that "the wage issue was legitimately disputed in good faith." [R. 12]. The circuit court tacitly affirmed this ruling. However, when the reason given by an employer for not paying wages is itself unlawful; it cannot, as a matter of law, constitute a "good faith" or "bona fide" dispute about the payment of wages.

An employer's intent to violate the law cannot constitute a "good faith" dispute, even if the employer claims ignorance of the law. *Cf. Oxford Finance Companies, Inc. v. Burgess*, 402 S.E.2d 480, 303 S.C. 534 (1991) (ignorance of the law excuses no man). To hold otherwise would give employers' permission to commit wage theft without accountability by feigning ignorance of the law. *Cf*. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 316, 698 S.E.2d 773 (S.C. 2010) (the employer's belief must be "reasonable.")[9]

[9] Similarly, Respondents' half-hearted attempt to pay Mr. Wilson after its failure to defend its actions at the Labor Board does not weigh into this Court's analysis as to whether Respondents had a "good faith" reason for withholding wages on October 20, 2017.

The case of *Rice v. Multimedia* gives guidance on how to determine if an employer's reason for withholding wages can be considered good faith. 318 S.C. 95, 98, 456 S.E.2d 381 (S.C. 1995). The *Rice* court explained that treble damages are justified where the retention is "unjustified and wilful[.]"; and that an employer should not be punished when there is a "valid defense to payment." *Id.* at 98-99. The court reasoned, "We do not believe the legislature intended to deter the litigation of reasonable good faith wage disputes; we do believe the legislature intended to punish the employer who forces the employee to resort to the court in an *unreasonable or bad faith* wage dispute." *Id.* at 99 (emphasis added).

But how is a court to know what is justified versus unjustified, or what is reasonable versus unreasonable? Fortunately, *Rice* offers more concrete guidance that is directly applicable to the present case. The *Rice* court explained that employers should not be punished when there is a "close question of law or facts which should properly be decided by the courts." *Id.* at 90. The corollary to this is that employer *should* be punished when the reason for withholding wages is clearly and explicitly prohibited by law.

And that is the case here. As shown above, there can be no dispute that the SCPWA explicitly prohibits a deduction from wages for "faulty work," when there has been no notice of this deduction and that this cannot be abrogated by a private agreement. An unlawful reason cannot be considered a "reasonable," "bona fide," or "good faith" reason. The *Bennett v. Lambroukos* case illustrates this principle.

In *Bennett*, like here, the employer deducted from wages for "breakage" when there was no notice of this deduction in the written terms of employment. 303 S.C. at 483. Also like here, while there were no written terms of deductions at the time of hiring, but

the employer claimed there was "contract" that allowed for deductions for breakage. *Id.* at 483-84. The magistrate rejected the "contract" argument and found that the Bennett was not notified of a deduction for breakage at the time of hire as required by the SCPWA and awarded treble damages. *Id.* at 484. The circuit court reversed, but the court of appeals found that the magistrate had not erred by awarding treble damages. Thus, the *Bennett* court necessarily found that the reason Respondents assert here for withholding wages—a deduction that was not in the terms of employment—was *not* a good faith reason, and treble damages were warranted. *Bennett* is controlling and should be followed by this Court.

Similarly, Respondents' counter-claim under a course-of-dealings theory does not establish a "bona fide" dispute. In the first instance, this is so because the counter-claim Respondents asserted in this action was *not* the reason they withheld wages at the time. As the Magistrate "found," the Respondents initial reason for withholding wages because of deduction for "defective work" at one job only—the 1108 Ocean Club house that had been painted the week before Mr. Wilson resigned. [R. 7-8.] Respondents counter claim for $3800 based on a "contract" only arose *later*, when Defendant filed an Answer to the Complaint. [10] [R. 43-45.]

As the *Mathis* court explains, "the relevant date for determining whether the employer reasonably withheld wages is the time at which the wages were withheld, i.e., when the employer allegedly violated the Act." *Mathis*, 389 S.C. at 316. Therefore, the later counter claim based on a course-of-dealings theory should not be considered by this

[10] Indeed, we know that Respondents only asserted the counter claim *because of* the lawsuit, because Mr. Singleton testified that he "believed his decision to send the check to Plaintiff would end the matter[.]" [R. 10.]

Court in determining whether Respondents had a good faith basis for withholding wages on October 20, 2017. And regardless, the course-of-dealings theory cannot be considered a "valid defense" because it is explicitly barred by S.C. Code. Ann. 41-10-100 as well as *Cato v. Mills* and *Bennett v. Lambroukos*.

A survey of the cases illustrates that our courts do not find an employer's reason to be "good faith" when the employer has violated the SCPWA without a reasonable or lawful basis for doing so. In *Ross v. Ligand Pharm*, 371 S.C. 464, 639 S.E.2d 460 (S.C. Ct. App. 2006), the employer withheld wages from a commissioned salesman after his resignation, because the salesman was no longer employer after the "target date" in the employer's incentive plan. However, the circuit court found a violation of the SCPWA because the "target date" served no purpose and the employer had not provided a time for payment of wages. *Id.* at 468. The circuit court awarded treble damages and attorney's fees and the court of appeals affirmed, finding that the employer's reason for not paying the wages was based on a "unilateral, arbitrary decision on when to issue compensation and no good faith dispute existed." *Id.* at 472.

In the *Mathis* case, the employer contended that it reasonably believed that the agreed-upon wages were not due because of "waiver" i.e., the Mathis had continued to work after his salary was reduced, and because of an alleged violation of a non-piracy provision by Mathis. 389 S.C. at 316. The *Mathis* court affirmed the trial court's that this was not a "reasonable good faith reason" to for not paying the wages due at the time of discharge.

And in *Atkinson v. House of Raeford Farms, Inc.*, Civil Action No.: 6:09-cv-01901-JMC (D.S.C. July 12, 2012) the plaintiff was not paid for breaks under 20 minutes or

donning and doffing time. The employer argued that treble damages should not be awarded because it was its practice to only pay employees for “line time” rather that the hours that they were “clocked-in at work” and that the court’s dismissal of the plaintiff’s FLSA and overtime claim establishes that there was a bona fide dispute about wages due. *Id.* at 5. Despite the dismissal of the FLSA and overtime claims the district court still found that there was no bona fide dispute with regard to the unpaid wages that the jury found were due, because this was not in the written terms of employment. *Id.* at 6.

The Appellant does not contend that Respondents’ reason for withholding wages was bad faith, simply because the magistrate found that the wages were in fact due. Rather, it is the unlawful nature of the *reason* that Respondents gave which precludes the reason from being considered good faith.

There are many cases in which courts have found the employer had a good faith reason to dispute that the wages were due. However, most of these fall into the category of a disagreement about how to calculate compensation. See, e.g. *Linder v. Paramount Acceptance Corp*., 291 S.C. 539, 354 S.E.2d 567 (Ct.App.1987) (employer paid the employee hourly wages and commissions upon her discharge, but there was a disagreement on the amount of commission and hourly wages due.); *Sill v. AVSX Techs*., LLC, Civil Action No: 3:16-cv-0555-MBS, at *7 (D.S.C. January 26, 2018) (“Defendant's belief that under the Vector calculations Plaintiffs' chargebacks exceeded their holdbacks . . . demonstrates the existence of a bona fide dispute”); *Bismack v. Xerox Corp*., C. A. 6:21-04103-HMH (D.S.C. December 22, 2022) (terms of incentive pay were ambiguous). Or, our courts have held that it is not bad faith to withhold wages when the reason is based on an alleged breach of the duty of loyalty. See, e.g., *Futch v. McAllister Towing*

of Georgetown, 518 S.E.2d 591, 335 S.C. 598 (1999). However, neither of those situations exist here.

The undersigned is not aware of any case in which a court found that the employer's belief that it could withhold *wages in violation of statute* constituted a good faith, valid, or reasonable basis to withhold wage, nor have Respondents cited any. This fact alone precludes the holding urged by Respondents.

But perhaps the most important reason for reversing the "good faith" finding is that to hold otherwise would eviscerate the remedial treble damages provision of the SCPWA. If an employer could avoid treble damages by giving an unlawful reason for withholding wages, then there would be no incentive to pay the wages in the first instance. This is because the worst thing that could happen to an employer who withholds wages is that they will merely have to pay the wages that were due in the first place. Without treble damages and attorneys fees, there is no risk to the employer for withholding wages. If an unlawful reason was consider valid, it would be impossible to conceive of a situation in which employers would actually be punished for withholding wages. The statute would lose all deterrent effect. This would eviscerate the SCPWA and reward and incentivize lawlessness. *See Cato*, 129 S.E. at 205 ("if the object of the statute can be thwarted by custom or contract, then the statute might as well be repealed[.]" What is more, the rule urged by Respondents would allow business owners to allocate the risk of loss to their employees, without their notice or consent.

The "good faith" defense to treble damages is not an excuse for employers to avoid accountability by feigning ignorance about their most basic obligations under state labor law. This Court should rule that Respondents' basis for withholding wages was unlawful

and therefore as a matter of law does not constitute a "good faith dispute," and that Respondents are therefore liable to the Plaintiff for treble damages and reasonable attorneys' fees and costs, to be determined by this Court.

CONCLUSION

For the foregoing reasons, this Court should hold that the Respondents may not assert counter claims under a course-of-dealing theory, that Respondents' reason for withholding wages was not a "good faith", and remand to the Circuit Court to award treble damages and a determination of attorney's fees and costs.

Respectfully submitted April 22, 2024

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