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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2014-002574

Joseph Anthony Gelotte,

Respondent,

v.

Davis Roofing and Maintenance, LLC, and Jerry Davis, Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. The lower court erred by awarding the employee wages because the employer overpaid the employee by \$3,069.32.
2. The lower court erred by awarding treble damages and attorney's fees to the employee because there was a bona fide dispute over the amount of wages the employer owed the employee, if any were owed.

STATEMENT OF THE CASE

1. Procedural History

This is an appeal from the circuit court's grant of treble damages, attorney's fees, and costs per the South Carolina Payment of Wages Act on October 22, 2014.

The Respondent, Joseph Anthony Gelotte, (the "Employee") filed a civil action against the Appellants, Davis Roofing and Maintenance, LLC and Jerry E. Davis, (collectively, the "Employer") on October 26, 2011, alleging breach of an employment contract, failure to pay wages totaling approximately eleven thousand dollars (\$11,000), and defamation. On November 29, 2011, the Employer denied the Employee's claims and counterclaimed for money that the Employer paid to the Employee, but was not earned by the Employee. On December 19, 2011, the Employee denied the Employer's counterclaim.

The case was placed on the Non-Jury Back-Up for Jury Docket for the week starting May 5, 2014. On Friday, May 2, 2014, the Employer's counsel filed a Motion in Limine and the Employee's counsel requested protection from the court for Monday until 2:00 p.m. via email and regular mail. On Sunday, May 4, 2014, the Employee's counsel notified the Employer's counsel via email that the lower court had granted his requested protection. However, the Employer's counsel was out of the office and did not access the email until the morning of Monday, May 5, 2014. Later in the morning, the Employer's counsel received notice that the trial would take place at 2:00 p.m. that same day. Prior to commencement of the trial, the Employer's counsel moved before the court for a continuance due to the Employer's absence and confusion with the rolling docket. The court denied the motion. The Employer's counsel then withdrew the Motion in Limine

because it was unnecessary for the court to hear it once the Employer was prevented from testifying.

At trial, the Employee's counsel requested and the court granted his leave to file an affidavit for attorney's fees. The Employee's counsel sent the affidavit regarding attorney's fees to the court on June 10, 2014. The lower court entered an Order on June 19, 2014, which held that the Employer owed the Employee \$11,730.68 in wages and commissions, and granted the Employee treble damages of \$35,192.04 as well as unspecified attorney's fees. On June 27, 2014, the Employer filed a Motion to Reconsider, Alter, or Amend per South Carolina Rules of Civil Procedure ("SCRCP") Rules 52(b), 59(e), and 60. On October 28, 2014, the Employer's counsel received notice of an Order entered on October 22, 2014 disposing of that Motion. In its October 22, 2014 Order, the court granted the Employee \$35,192.04 as treble the actual amount of damages for unpaid wages (\$11,730.68), \$12,217.21 for reasonable attorney's fees, and \$271.72 for the costs of the action pursuant to SCRCP Rule 54(d) and (e). The Employer filed and served the Notice of Appeal on November 21, 2014.

2. The evidence presented at trial.

The Employee worked for the Employer from sometime in March 2011 to near the beginning of July 2011. During that time the Employee earned \$32,010.68 in wages and commissions. (Trial Transcript p. 22, lines 8 through 11; Id. at p. 29, lines 18 through 24) The Employee claimed that the Employer paid him just \$20,280.00 and therefore owed him \$11,730.68. (Trial Transcript p. 23, lines 11 through 16; Id. at 29, lines 18 through 24; Plaintiff's Exhibit 2)

Below is a calculation of the Employee's claim:

\$32,010.68	wages earned
<u>(\$20,280.00)</u>	admitted payments
\$11,730.68	wages the Employee claimed were due and owing

The trial court ordered the Employer to pay the Employee treble the amount of damages claimed, which amounted to \$35,192.04 (\$11,730.68 x 3), plus attorney's fees because the court determined that there was no bona fide dispute over the amount of wages owed.

However, the Employer wrote three checks to the Employee that were neither included in the court's calculation of paid wages nor the Employee's. (Plaintiff's Exhibit 2; Defendant's Exhibit 2, p. 2, 3, and 4) The Employer issued a check for \$7,500.00 to the Employee on April 22, 2011 (the "\$7,500.00 check"). The Employer issued a check to the Employee for \$6,300.00 on May 13, 2011 (the "\$6,300.00 check"). The Employer issued a check to the Employee for \$1,000.00 on June 29, 2011 (the "\$1,000.00 check").

Both the \$7,500.00 check and the \$6,300.00 check were endorsed with the Employee's signature and driver's license number. (Trail Transcript p. 37 and 38; Defendant's Exhibit 2, pages 3 and 4) The checks also included a cell phone number that the Employee claimed he could not remember being either his or the Employer's. (Trial Transcript p. 37, lines 12 through 22) The Employee testified that he did not cash the \$7,500.00 check and \$6,300.00 check because the Employer simply wrote the two checks to "get [the Employer's] books caught up." (Trial Transcript p. 35, lines 1 through 9) When deposed, the Employee stated that he personally "tore up" the \$7,500.00 check and \$6,300.00 check. (Trial Transcript p. 41, lines 2 through 11) At trial, the Employee first

testified that the Employer kept the \$7,500.00 check and \$6,300.00 check. Later the Employee testified that Employer tore up the \$7,500.00 check and \$6,300.00 check. Finally, the Employee testified that it was either the Employer or him, the Employee, who tore up the \$7,500.00 check and \$6,300.00 check. (Trial Transcript p. 35, lines 3 through 9; Id. at p. 41, lines 8 through 13) Regardless, the checks appeared to have been cashed by someone at a Spartanburg convenience store called Ruchi Food Mart Inc. (Defendant's Exhibit 2, p. 3 and 4).

The Employee failed to report all wages he received from the Employer on his 2011 income tax return. (Trial Transcript p. 33, lines 14 through 24; Id. at p. 34, lines 14 through 16; Defendant's Exhibit 1, p. 1) At one point during the trial, the Employee testified that he attempted to report the value of the \$7,500.00 check and the \$6,300.00 check on his tax return. (Id.; Trial Transcript p. 34, lines 3 through 8; p. 40, lines 13 through 16) Eventually the Employee testified, consistently with his deposition, that he claimed the \$7,500.00 check and the \$6,300.00 check on his 2011 income tax return. (Trial Transcript p. 40, lines 13 through 16; Id. at p. 41, lines 2 through 12)

ARGUMENTS

I. THE LOWER COURT ERRED BY AWARDING THE EMPLOYEE WAGES BECAUSE THE EMPLOYER OVERPAID THE EMPLOYEE BY \$3,069.32.

The trial court's Orders finding that the Employer owed the Employee undisputed wages in the amount of \$11,730.68 entirely ignores the Employee's admissions that he received three checks, the total of which are \$14,800.00, that were not included in the Employee's calculation of wages owed. The Employee testified that he earned \$32,010.68 while working for the Employer and the Employer paid him \$20,280.00. (Trial Transcript p. 22 and 23; Plaintiff's Exhibit 2). The Employee's calculation of the wages the Employer paid him only included one check for \$380 dated May 25, 2011. (Plaintiff's Exhibit 2) The last payment the Employee set forth in his calculation of wages paid was \$2,000.00 in cash that he received on June 10, 2011. (Id.)

However, the Employee admitted to receiving a check from the Employer for \$1,000.00 in July 2011. (Trial Transcript p. 26, lines 17 through 23; Id. at p. 27; Id. at p. 33, lines 10 through 13; Plaintiff's Exhibit 10, p. 7; Defendant's Exhibit 2, p. 2) That \$1,000.00 check was not included in the Employee's or the lower court's calculation of wages that the Employer paid him. (Plaintiff's Exhibit 2; June 19, 2014 Order p.3, ¶ 3) The only evidence presented at trial was that the Employee received the \$1,000.00 check from the Employer for the payment of wages and the \$1,000.00 check should be included

in the calculation of wages paid. Therefore, the lower court miscalculated the wages owed.

Below is a calculation of the Employee's claim adjusted by the \$1,000.00 check he admittedly received.

\$32,010.68	wages earned
-\$20,280.00	admitted payments
<u>-\$1,000.00</u>	check dated 6-29-2011
\$10,730.68	adjusted total of wages owed

In his deposition, the Employee claimed that he tore up the \$7,500.00 check and the \$6,300.00 check, but the evidence unambiguously shows that those two checks were cashed. (Trial Transcript, page 35, lines 1 through 9; Id. at page 40, lines 13 through 25, Id. at page 41, lines 1 through 12; Defendants' Exhibit 2, pages 3 and 4). Those checks were endorsed with the Employee's signature and driver's license number. (Defendants' Exhibit 2, p. 3 and 4). The Employee also admitted that he claimed the \$7,500.00 check and the \$6,300.00 check on his 2011 tax return. (Trial Transcript p. 40, lines 13 through 16; Id. at p. 41, lines 2 through 11).

The South Carolina Supreme Court has held that information in an income tax return is important for the purpose of impeachment and as an admission of a party opponent when the admission is relevant to a party's claim. *Cornwell v. Plummer*, 265 S.C. 587, 591 (1975), 220 S.E.2d 879, 881. The United States Tax Court "[has] held repeatedly that statements made in a tax return signed by a taxpayer are binding and treated as admissions." Route 231, LLC v. Comm'r, T.C. Memo. 2014-30, page 57. The Employee's income tax return required the Employee to verify that, "Under penalties of perjury, I declare that I have examined this return and accompanying schedules and

statements, and to the best of my knowledge and belief, they are true, correct, and complete.” (Defendant’s Exhibit 1, p. 3).

Here, the Employee made a binding admission when he claimed the \$7,500.00 check and the \$6,300.00 check on his income tax return and could not later deny that he received those checks from the Employer to support his claim for unpaid wages.

Therefore, the lower court erred by failing to include those two checks in the calculation of wages owed. Had the court included the two checks in its calculation, the court would have found that the Employee owes the Employer \$3,069.32.

Below is a calculation of wages owed, adjusted by the three checks the Employee admittedly received from the Employer.

\$32,010.68	wages earned
-\$20,280.00	admitted payments
-\$7,500.00	check dated 4-22-2011
-\$6,300.00	check dated 5-13-2011
<u>-\$1,000.00</u>	check dated 6-29-2011
-\$3,069.32	wages owed to the Employee
\$3,069.32	Amount the Employee owes the Employer

II. THE LOWER COURT ERRED BY AWARDING
TREBLE DAMAGES AND ATTORNEY’S FEES TO
THE EMPLOYEE BECAUSE THERE WAS A BONA
FIDE DISPUTE OVER THE AMOUNT OF WAGES THE
EMPLOYER OWED THE EMPLOYEE, IF ANY WERE
OWED.

In its June 19, 2014 Order, the lower court held that “[b]ecause there is no evidence of any bona fide dispute over the non-payment of these wages, the plaintiff is also entitled to treble damages under the Act, totaling to an award of \$35,192.04. This is three times the amount of the unpaid wages owed to the plaintiff. The plaintiff is also entitled to attorney’s fees under S.C. Code Ann. § 41-10-80.” (June 19, 2014 Order p.3, ¶’s 3 and 4). S.C. Code Ann. § 41-10-80(C) states, “In case of any failure to pay wages due to an Employee as required by Section 41-10-40 or 41-10-50 the Employee may 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.”

The Supreme Court of South Carolina has historically held that a lower court’s decision to award treble damages and attorney’s fees must be predicated upon the nonexistence of a bona fide wage dispute. In *Futch v. McAllister Towing of Georgetown*, 518 SE 2d 591, 335 S.C. 598 (S.C. 1999), the Supreme Court of South Carolina declined to reinstate an award of treble damages and attorney's fees “because there was a bona fide dispute about whether Employer owed [Employee] any wages.” In an earlier case, the Supreme Court of South Carolina held that, “The imposition of treble damages in those

cases where there is a bona fide dispute would be unjust and harsh.” *Rice v. Multimedia, Inc.*, 318 S.C. 95, 456 S.E.2d 381 (S.C., 1994). The Court in *Rice* based its decision to decline treble damages in part on the compelling reasoning used by the Court of Appeals of Arizona in *Apache East, Inc. v. Wiegand*, 119 Ariz. 308, 580 P.2d 769 (Ct.App.1978). There, the Arizona Court reasoned that, “there are some wage disputes when the issue may involve a valid close question of law or fact which should properly be decided by the courts. 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.*

Here, the Employee admittedly received a check for \$1,000 that the Employee did not include in his calculation of wages owed. When the Employee demanded payment, the Employer would have rightfully disputed owing the Employee \$1,000.00 that they had already paid to the Employee. In his deposition, the Employee claimed that he tore up the \$7,500.00 check and the \$6,300.00 check, but the evidence unambiguously shows that those two checks were cashed. (Trial Transcript, page 35, lines 1 through 9; *Id.* at page 40, lines 13 through 25, *Id.* at page 41, lines 1 through 12; Defendants’ Exhibit 2, pages 3 and 4). Those checks were endorsed with the Employee’s signature and driver’s license number. (Defendants’ Exhibit 2, p. 3 and 4). The Employee then claimed the \$7,500.00 check and the \$6,300.00 check on his 2011 tax return. (Trial Transcript p. 40, lines 13 through 16; *Id.* at p. 41, lines 2 through 11).

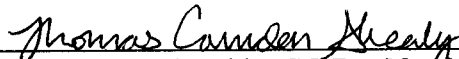
The lower court’s holding that there was no bona fide dispute that the Employer owed the Employee \$11,730.68 is clearly erroneous and the consequent award of treble

damages and attorney's fees was therefore unjust and harsh. It is undisputed that the Employee did not include the \$1,000.00 check that he received in his calculation of damages. There is at least a question whether the Employee should have included the \$7,500.00 check and the \$6,300.00 check in his calculation of damages. The Employer has found no South Carolina case directly on point as to whether the Employee made a binding admission that he received the \$7,500.00 check and the \$6,300.00 check when he claimed them on his income tax return. There is a question of fact as to whether the Employee cashed those two checks. If those close questions would have resolved in the Employer's favor, the Employer would not owe the Employee any wages. In fact, the Employee would owe the Employer \$3,069.32. Even if those issues do not conclusively resolve in the Employer's favor, they produce a good faith, bona fide dispute between the Employer and Employee over unpaid wages. The Employer reasonably challenged the Employee's allegations in the lower court and should not suffer treble damages and attorney's fees for doing so.

CONCLUSION

For the foregoing reasons, the Appellants respectfully submit that this Court should reverse the judgment of the lower court, hold that the Employee owes the Employer \$3,069.32, or, in the alternative, that there existed a bona fide dispute over the non-payment of wages that precluded the Employee from receiving an award of treble damages and attorney's fees.

Respectfully Submitted,



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Attorneys for Appellants

December 19, 2014

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December 17, 2014

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SC Court of Appeals

ATTN: Diane
S.C. Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Jerry A. Bruce, Respondent v. Flint Equipment Co., Appellant
Appellate Case No.: 2013-002435

Dear Diane:

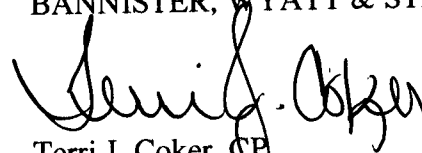
Enclosed are 17 labels reflecting the correct caption in the above-referenced case. Please affix these to the cover of the original and each copy of the Final Brief of Respondent.

By copy of this letter I am delivering a label to opposing counsel and asking that he also affix the label to his copy of the Final Brief of Respondent.

Please let me know if I need to do anything further.

Yours truly,

BANNISTER, WYATT & STALVEY, LLC



Terri J. Coker, CP
Paralegal to O. W. Bannister

/tjc

Enclosures

cc: C. Frederic Marcinak, Esq., w/enclosure

BPS: Diane, I hope that you have a wonderful Christmas and New Year and that you enjoy your time off. Thank you for all the help you have given me this year. I don't know what I would have done without your kind and generous assistance – especially on that dreaded cross appeal in another case!

Sincerely,

A handwritten signature in cursive script, appearing to read "Laurie". The signature is written in black ink on a white background.