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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

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SC Court of Appeals

Joseph Anthony Gelotte,

Respondent,

v.

Davis Roofing and Maintenance, LLC, and Jerry Davis,

Appellants.

PETITION FOR REHEARING

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February 4, 2016

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INTRODUCTION

Pursuant to Rule 221(a) and Rule 240, SCACR the Appellants respectfully petition this Court for a rehearing of Unpublished Opinion No. 2016-UP-037, dated January 20, 2016. Rehearing is warranted when the Court has overlooked or misapprehended an argument. *Kennedy v. S.C. Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001). When the Court fails to address some of the arguments raised in the appeal, “a prima facie case for rehearing has been made.” *Covar v. Sallat*, 22 S.C. 265, 272 (1885).

SUMMARY OF ARGUMENTS

This appeal arose out of a lower court’s decision to award the Respondent relief under the South Carolina Payment of Wages Act against the Appellants. The Court’s Opinion overlooks the Appellants’ argument that the Respondent made an admission that he received a \$7,500.00 check and a \$6,300.00 check from the Appellants by claiming those checks on his income tax return, which income, if received by the Respondent, would mean the Appellants overpaid the Respondent by \$3,069.32. The Court’s Opinion overlooks or misapprehends the Appellants’ argument that, if the Appellants did not overpay the Respondent, then there existed a bona fide dispute between the parties such that the lower court’s award of treble damages, costs, and attorney’s fees was improper.

ARGUMENT

i. The Court's Opinion overlooks the argument that the Respondent made an admission when he claimed two checks from the Appellants on his income tax return that he did not include in his calculation of damages.

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." R. p. 113.

In this case, the Respondent made a binding admission when he claimed a check for \$7,500.00 and another check for \$6,300.00 on his income tax return and could not later deny that he received those checks or claim he "tore up" those checks from the Appellants to support his claim for unpaid wages.

When asked by Appellants' counsel, "What did you say happened to those last two checks that I showed you on Defendant's Exhibit number 2, Mr. Gelotte?" The values of the checks were \$7,500 and \$6,300, respectively. R. pp. 116 and 117.

The Respondent replied, "I claimed them on my taxes." R. p. 63, line 13 to 16.

The Court's Opinion overlooked the difference in the calculation of damages that the checks would have made. Including the checks in calculation of damages would

have shown that the Appellants do not owe the Respondent \$10,730.68, but instead, the Respondent owes the Appellants \$3,069.32.

ii. The Court's Opinion overlooks or misapprehends the Appellants' argument that, if the Appellants did not overpay the Respondent, then there existed a bona fide dispute between the parties such that the lower court's award of treble damages, costs, and attorney's fees was improper.

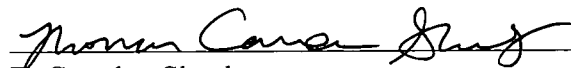
The Supreme Court of South Carolina has historically held that a lower court's decision to award treble damages and attorney's fees must be predicated upon the nonexistence of a bona fide wage dispute. In *Futch v. McAllister Towing of Georgetown*, 518 SE 2d 591, 335 S.C. 598 (S.C. 1999), the Supreme 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.*

The Court's Opinion did correct the lower court's mistake of inflating the calculation of damages by \$1,000, but did not take account of the checks for \$7,500 and \$6,300 that the Appellants issued to the Respondent, were endorsed with the Respondent's signature and driver's license number, and cashed. R. pp. 116 and 117. That evidence could produce a good faith, bona fide dispute between the parties over unpaid wages, with which the Appellants could reasonably challenge the Respondent's unpaid wage claims in the lower court and not be liable for treble damages, costs, and attorney's fees.

CONCLUSION

WHEREFORE, the Appellants seek an Order granting Rehearing, and concluding that the lower court should reverse its judgment and hold that the Respondent owes the Appellants \$3,069.32 for overpayment, or, in the alternative, that there existed a bona fide dispute over the non-payment of wages that precluded the Respondent from receiving an award of treble damages, costs, and attorney's fees.

Respectfully submitted,



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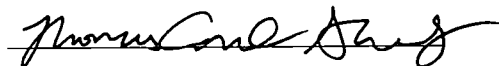
Appellants.

PROOF OF SERVICE

I, the undersigned attorney for the Appellants, Davis Roofing and Maintenance, LLC, and Jerry Davis, do hereby certify that I have served the Clerk of Court for the South Carolina Court of Appeals and all counsel in this action with a copy of the Petition for Rehearing, and Proof of Service by mailing a copy of the same by United States Mail, postage prepaid, or hand delivery to the following addresses:

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