STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
BENJAMIN H. CULBERTSON, CIRCUIT COURT JUDGE

Case No. 2015-CP-10-3220
Appellate Case No. 2016-002469

Shane Gould, ... Respondent,

v.

Worldwide Apparel LLC, f/k/a
MusclePharm Sportswear LLC and
Drew Ciccarelli, ... Appellants.

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STATEMENT OF THE CASE

This matter was initiated by Respondent Shane Gould's filing of a Summons and Complaint against Appellants on June 5, 2015. The complaint included causes of action for breach of contract and a claim pursuant to the South Carolina Wage Payment Act, S.C. Code Ann. § 41-10-10 et seq. (Complaint). Defendants filed an Answer on July 6, 2015. (Answer). Respondent filed a Motion for Summary Judgment and for Discovery Sanctions on May 26, 2016. (Motion for S.J.) That motion was later amended on June 10, 2016. (Pl. Amended Motion for S.J.). Appellants submitted a memorandum in opposition to the amended motion on July 7, 2016. (Def. Memo in opposition). Respondent filed a memo in support of its motion on July 12, 2016. (Memo in Support). A hearing on the motion was held that same date before the Honorable Benjamin H. Culbertson. Judge Culbertson later signed a Form 4 Order on July 15, 2016, indicating a formal order would follow. (Form 4 order dated 7.15.16). He then sent a letter dated July 18, 2016 to the parties, instructing Respondent to prepare an order granting the motion for summary judgment. (Culbertson letter dated 7.8.16).

Appellants filed a Motion for Reconsideration pursuant to Rule 59(e) on July 25, 2016, which included a memorandum in support of its motion. (Def. 59(e) motion). Respondents filed a memorandum in opposition to that Rule 59(e) motion on August 15, 2016. (Pl. memo 8.15.16).

On November 3, 2016, Judge Culbertson signed a formal order granting summary judgment on behalf of Respondents, and subsequently filed an order denying reconsideration thereof on November 8, 2016. (Order granting S.J. and Order denying reconsideration). Appellants timely appealed both orders by filing a Notice of Appeal on December 8, 2016. (Notice of Appeal).

STATEMENT OF FACTS

MusclePharm Corporation (hereafter "MusclePharm Supplements") is a publicly traded nutritional and sports supplement product manufacturer marketed towards athletes and bodybuilders. MusclePharm Supplements is not, nor has it ever been, a party to this action.

MusclePharm Supplements licensed the right to sell apparel bearing its name and trademarked logos to a business operated under the name MusclePharm Sportswear, LLC. (hereafter "MusclePharm"), even after it changed its legal name to Worldwide Apparel, LLC. (Def. Depo, p. 58). Worldwide Apparel was partially owned by Appellant Ciccarelli.

Respondent Shane Gould owns his own company named Fuel Clothing Company, known simply as "Fuel," which he founded in 1992. Fuel produces apparel for "action sports" such as skateboard, snowboard, surf, motocross, and racing. (Gould Depo. p. 10, l. 17 – p. 11, l. 12). Gould was himself a former professional snowboarder and had participated in all of those listed action sports. (Id. at p. 7, l. 12; p. 11, ll. 13-15).

Gould was hired by MusclePharm in May, 2013 by a verbal agreement to be in charge of manufacturing, to assist with developing the product line, sourcing materials, marketing, and helping sales staff. (Def. Depo. p. 44, l. 21 – p. 45, l. 3; Gould Depo. p. 46, l. 22 – p. 47, l. 2). Gould did not have regular hours, but was supposed to attend staff meetings on a weekly basis. He agreed to work for MusclePharm at a salary of $10,000 per month. There was no agreed upon expiration date to the term to the employment nor was any provision of the agreement reduced to writing.

During his employment, Gould attended trade shows, paid for by MusclePharm. While attending on MusclePharm's dime, Gould nevertheless marketed his own company, Fuel, during those trips by, in part, handing out Fuel-branded apparel. This was despite representations made

by Gould that Fuel "ran itself pretty much." Gould did not advise MusclePharm he would market Fuel products while attending and supposedly promoting MusclePharm at the trade shows. (Def. Depo. p. 45, ll. 19 – 23). Certain decisions made by Gould, such as questionably large orders from particular suppliers/vendors ostensibly for MusclePharm, gave Ciccarelli and other employees of MusclePharm reason to suspect self-interested dealing by Gould for the benefit of Fuel. (Def. Depo. pp. 78-80). Gould admitted that he had preexisting personal relationships, was "good friends with, the vendors from which he was dealing on behalf of MusclePharm. (Gould Depo., p. 73, ll. 3-21)

Appellant Ciccarelli was open with Gould about his plan for the future of MusclePharm starting in July and August 2014, which was to build up the business such that MusclePharm Supplements would take an interest and eventually purchase MusclePharm to add an apparel component and complement to its core supplement manufacture and sale focus. (Gould Depo., p. 78, l. 24 – p. 79, l. 7). Gould understood "that was the whole goal of the business." *Id.* Ciccarelli first began discussions with Gould about a reduction in pay in August 2014 in anticipation of that business acquisition. (Def. Depo. p. 53). That was the last month that Gould received a salary payment.

Ciccarelli explained to Gould that since Gould's employment began, in just about one year of time, MusclePharm had lost $820,000 due to decreased sales. (Def. Depo, p. 54). In August, Gould and Ciccarelli personally discussed Gould's reduced workload and potential for reduced salary going forward. Soon thereafter, a series of text messages were exchanged between Gould and Ciccarelli that were consistent with and confirmed those direct discussions had between them.

To wit, the text messages include Ciccarelli proposing some alternate employment terms, including the possibility of converting Gould to payment on an hourly basis. (Exhibit A to Memo.

Opposing M.S.J.). In response, Gould references a failure by MusclePharm to pay that month's (September 2014) salary, but then proposed terms for a modified employment relationship going forward from that point. Under those proposed terms, Gould requested payment for his last two pay checks, which he received every two weeks. Additionally, he agreed that "my job is done as far as my duties over here" but "I will tie up any loose ends in the next few weeks." Ciccarelli responded via text with "K that sounds good and fair." Gould ended the exchange with a question as to how he should go about surrendering or destroying his company credit card. *Id.*

Gould from that point did some amount of work on behalf of MusclePharm, the extent of which is not established by the record, although at least portions were done without request of Ciccarelli after reaching the understanding confirmed by the texts. (Def. Depo. p. 68, l. 15). It was also provided based on the understanding of all involved that Gould was seeking continued employment by MusclePharm Supplements after the finished acquisition and his prior role at MusclePharm positioned him to transition into that continued lucrative employment. Gould had met with the CEO of MusclePharm Supplements previously, and confirmed in those text messages what had been discussed directly with Ciccarelli, that Gould was confident that MusclePharm Supplements intended to hire Gould after the acquisition. (Exhibit A to Memo. Opposing M.S.J.).

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, appellate courts apply the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *USAA Property and Cas. Ins. Co. v. Clegg*, 661 S.E.2d 791, 377 S.C. 643 (2008). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. *Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004).

Summary judgment is a "drastic remedy and should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues." *Hoard v. Roper Hosp. Inc.*, 387 S.C. 539, 694 S.E.2d 1, 4 (2010). It is "not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct.App.1995) (citing *Baugus v. Wessinger*, 303 S.C. 412, 401 S.E.2d 169 (1991)). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Nelson v. Charleston County Parks & Recreation Comm'n*, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct.App.2004).

ARGUMENT

I. BECAUSE OF THE EVIDENCE REGARDING ORAL DISCUSSIONS AND TEXT MESSAGES EXCHANGED REGARDING THE ISSUE, DID THE TRIAL COURT ERR IN FAILING TO RECOGNIZE A GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO THE OPERATIVE TERMS OF EMPLOYMENT BETWEEN THE PARTIES FOR THE ENTIRE PERIOD OF EMPLOYMENT, WHICH SHOULD HAVE PRECLUDED THE GRANT OF SUMMARY JUDGMENT?

It is undisputed that when Gould began work for MusclePharm in May 2013, he agreed to do so at a salary of $10,000 per month. The factual record upon which the trial court granted summary judgment is very limited, consisting almost entirely of two deposition transcripts, that of the Plaintiff Gould and Defendants.[1] Testimony during those depositions raised the factual issue of whether revised terms of employment and resolution of past due wages had been reached between the parties in August into September 2014, when discussions about company performance (i.e. substantial losses sustained during Gould's employment), reduced need for work in light of the anticipated sale of the company, and lowered salary as a result were had between Ciccarelli and Gould. (Def. Depo. p. 53, l. 2 – p. 54, l. 21).

Included in that testimony was Gould's prospects for continued employment with MusclePharm Supplements, a key factor in Ciccarelli's understanding of the nature of Gould's transformed employment after that time. Gould confirmed that he had engaged in discussions with the CEO of MusclePharm Supplements about Gould's plan for the apparel line in 2015, which was beyond the date of MusclePharm Sportswear's anticipated acquisition. (Gould Depo. p. 62, l. 24 – p. 63, l. 14).

[1] It was stipulated between the parties that the deposition testimony provided by Defendant Ciccarelli also served as the testimony of the Defendant Worldwide Apparel LLC d/b/a MusclePharm Sportswear LLC. (Def. Depo. p. 142, l. 23 – p. 143, l. 3).

Importantly, an exchange of texts confirms[2] those discussions in addition to the deposition testimony, and a fact-finder could reasonably determine that those texts were sufficient documentation to confirm an agreement had been reached to modify the operative terms of employment than those relied upon the trial court in its order.

In that text exchange, Gould addresses wages that were past due as of that point, but then turns to address prospective issues by stating "I will not worry about the rest of the time until Brad[3] takes over." (Copy of text messages attached to Def. Opposition to M.S.J.). In return, Ciccarelli says "K that sounds good and fair." *Id.* A fact-finder could reasonably view that exchange as Gould's offer to continue employment without further compensation in the future unless or until circumstances changed for MusclePharm.

Why would anyone previously making $10,000 per month agree to work for free? The answer begins with Gould's acknowledgment that "my job is done as far as my duties over here." He would not be putting forth substantial effort, or even the minimal effort he was previously for MusclePharm. Instead, Gould was marketing himself to his future employer, and using his supposedly-continued work with MusclePharm to do so. Also in that same text from Gould, he states "Then when [Brad] takes over he can hire me as an employee over there if he chooses." *Id.*

Based on his own text communications, it is clear that Gould perceived that he was in line for a plum, paid position with a successor entity ("he is all about having me come aboard") and his essentially-concluded duties for MusclePharm simply gave him a pretext to continue to market himself. *Id.* He even had Ciccarelli working on his behalf in that regard. (Ciccarelli Depo. p. 70, l. 3 – 6). Gould was therefore willing to maintain a nominal presence around MusclePharm, even

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[2] Gould authenticated those texts during his deposition. (Gould Depo. p. 95, ll. 4 – 21).

[3] "Brad" referred to here is Brad Pyatt, the CEO of MusclePharm Supplements.

without pay, which was a savvy business move that could be easily attributed to him as justification for a drastically modified employment arrangement with MusclePharm. That ability to maintain ties with the acquiring entity and its vendors, plus Ciccarelli's efforts to assist in maintaining those ties, constituted valid consideration for a change in the relationship between Gould and MusclePharm. All of those inferences precluded summary judgment.

The ongoing dispute about the nature and existence of those changed terms of employment is in no way inconsistent with the order's referenced testimony from Ciccarelli in which he acknowledged that Gould never "resigned" or was "terminated," that Gould was owed something beyond that which he had been paid, had done some manner of "services" during months in which he was not paid[4], and Ciccarelli had at that time intended to pay him some funds that were never eventually paid.

Those statements may all be taken as true, but yet remain meaningless statements in a vacuum because they do not resolve the continuing threshold question that must be answered prior to judgment of any sort: what are the operative terms under which Gould was employed after September 2014? While much is uncertain from the record, it is certain that factual disputes existed on that issue.

Accordingly, a genuine dispute exists as to whether the initial terms of employment with MusclePharm continued all the way through December 2014, or whether those terms terminated or changed in August or September 2014. That factual issue is material, as the order awarding

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[4] Ciccarelli indicated that at least some of the "services" provided by Gould after September 2014 were done "not per my request." (Def. Depo. p. 68, ll. 6 – 15). It is reasonable to view anything done by Gould during that period as self-serving relationship maintenance, both with venders and MusclePharm Supplements directly, to preserve his anticipated future employment with MusclePharm Supplements. Gould obviously positioned himself, using his now-completed value to MusclePharm, as part of the "package" to be acquired. Gould wanted MusclePharm Supplements to want him along with MusclePharm. He had to make himself appear to be indispensable, which required keeping a foot in the door, even without working hands along with that foot.

damages calculated the amount of wages due (and exacerbated that calculation by treble of the same) based on continuation of those initial terms through December. However, a genuine dispute between the parties continues in that regard, which necessitates fact-finding by a jury to resolve, and as such precludes the grant of summary judgment in favor of Gould.

II. DOES THE PAYMENT OF WAGES ACT, AS A MATTER OF LAW, RENDER NULL ANY CHANGE IN THE TERMS OF EMPLOYMENT THAT ARE AGREED UPON BETWEEN THE EMPLOYEE AND EMPLOYER MERELY BECAUSE THE TERMS WERE NOT CONFIRMED IN WRITING?

Although breach of an employment contract was a cause of action included in the complaint, Gould never disputed that his employment by MusclePharm was employment at-will. (Complaint). In South Carolina, employment at-will is presumed in the absence of the creation of a specific contract of employment. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 698 S.E.2d 773, 778 (2010). "An at-will employee may be terminated at any time for any reason or for no reason, with or without cause." *Id.* With the power to completely end employment without notice or cause, the employer must also possess the "lesser-included" authority to decide upon whether to offer, and/or whether to accept, altered terms of employment for a particular employee. It is a false dilemma to assert that an employer must either fully terminate an employee or continue without amendment of the original terms of employment.

Certain statutory restrictions carve out exceptions on such absolute or derivative authority, such as restrictions on actions taken on account of age, race, etc. by certain covered employers. See S.C. Code Ann. § 1-13-80. Nevertheless, the South Carolina Payment of Wages Act (S.C. Code § 41-10-10 et seq.), does *not* constitute such a restriction if properly applied in these circumstances.

The purpose of the Payment of Wages Act (hereafter the "Act") is "to protect employees from the unjustified and willful retention of wages by the employer." *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 698 S.E.2d 773, 783 (2010). It is "remedial legislation." *Dumas v. InfoSafe Corp.*, 320 S.C. 188, 463 S.E.2d 641 (Ct.App.1995). At its core, it simply requires that "[e]very employer in the State shall pay all wages due..." S.C. Code Ann. § 41-10-40(A). It further provides that "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." S.C. Code Ann. § 41-10-40(C).

The Act, therefore, reduces the matter to the basic inquiry of "what was owed, and was it paid?" The Act does not, as the order granting summary judgment mistakenly approached the matter, turn upon an analysis of the sufficiency of notice pursuant to § 41-10-30(A) as a basis for award of damages and penalties.

A. The Act does not provide for employee recovery for mere failure to provide notice in writing of certain terms of employment.

The Act contains a notice provision which states:

> 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.

S.C. Code Ann. § 41-10-30(A) (hereafter "notice provision"). Gould alleged, and the Trial Court agreed, that Defendants failed to comply with this notice provision. It is first contended that the text messages discussed supra, when viewed with all inferences in favor of the non-movant Defendants, comply with the requirements of this notice provision.

Nevertheless, there is no remedy provision in the Act which provides for any private award as sought by Plaintiff on the basis of a failure to provide the notice required by § 41-10-30(A), even if the failure is acknowledged by the employer. The only penalties in the event of such a failure that are available are written warning by the Directory of the Department of Labor, Licensing, and Regulation or civil penalties "of not more than one hundred dollars" for each subsequent violation. S.C. Code Ann. § 41-10-80(A) and (B); *Barton v. House of Raeford Farms*, 745 F.3d 95 (4th Cir. 2014).

Accordingly, the most relief an employee can claim solely as the result of a notice provision failure is a seven-day delay before enforcement of the modified terms of employment. S.C. Code Ann. § 41-10-30(A). There may be an ongoing dispute as to when that seven-day period should or did begin, but that would constitute another material fact in genuine dispute that would preclude the grant of summary judgment.

B. The order misapplied the provisions that allow for potential employee recovery by not limiting the award to unpaid wages due.

Employee recovery of damages and attorney fees is of course possible under the Act, but only for the limited circumstances as set forth in S.C. Code Ann. § 41-10-80(C), which provides that:

> 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.

Thus, a prerequisite for any award to Plaintiff would be to first demonstrate a violation of §§ 41-10-40 or 41-10-50. The latter merely addresses the manner in which final paychecks must be paid upon termination, which is not applicable in this matter. The other potential basis for a recovery, § 41-10-40, has two potentially applicable paragraphs, the first of which provides as follows:

> Every employer in the State shall pay all wages due in lawful United States money or by negotiable warrant or check bearing even date with the payday.

S.C. Code Ann. § 41-10-40(A).

In this case, there were amounts admittedly unpaid to Gould as of the referenced oral discussions and agreement via text message exchange in September 2014. Absent the equitable defenses potentially applicable (discussed infra in Issue III), those unpaid wages as of that date might have properly been addressed by an order granting summary judgment in this case, as they were wages due for labor rendered in the past that remain unpaid in violation of § 41-10-40(A). However, this order goes further. It disregards the inherent limitation in § 41-10-40(A) as to unpaid, past due wages by ignoring the modified agreement between the parties discussed supra and thereby creating further wages allegedly due.

C. The notice provision still lacks a punitive consequence for non-compliance, even though it may operate to excuse certain withholdings of a type not present in this action.

The Trial Court also misapprehended the reference to the notice provision in the other portion of § 41-10-40 that is potentially applicable in this matter, paragraph (C). That paragraph provides as follows:

> An employer shall not withhold or divert any portion of an employee's wages unless the employer is required or permitted to do so by state or federal law or 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.

By that clear language, and *only in the context of when an employer "withhold[s] or divert[s] any portion of the wages,"* does the notice provision become relevant as to potential employee recovery. But even then, it only acts as a potential bar to recovery, not a spur to recovery as treated by the Trial Court in its order.

Understood correctly, § 41-10-40(C) merely treats surprise withholdings/deductions in the same manner as "traditional" unpaid wages. The necessity of such a "treated the same as unpaid wages" provision is made clear by Supreme Court precedent that defined the nature of "deductions" within the statute as meaning "the act of taking away from a salary in order to fund some benefit." *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 698 S.E.2d 773, 782 (2010). This provision prevents the employer from contending that the employee was fully compensated because of "deductions" ostensibly made for the employee's benefit.

In *Mathis*, the Supreme Court distinguished such deductions from salary "reductions," i.e. actual changes in pay. *Id.* As that case made clear, deductions could be justified as proper under § 41-10-40(C) upon demonstrated compliance with the notice provision, but reductions are not subject to any saving grace via notice provision compliance. The reduction must be proper in its own right, independent of whether proper notice was provided pursuant to § 41-10-30(A). The only reason the reduction was found improper in *Mathis*, with the employer subject to liability as a result, was because the Court found that the employee had an enforceable term employment agreement that had not yet expired. *Id.* at 782-783.

Here, there was no deviation from the at-will employment status of Gould as discussed above, and no reason the reduction reached by agreement as also discussed supra was ineffective or unlawful. That is true regardless of whether Defendants in this matter complied with the notice provision contained in § 41-10-30(A), because neither § 41-10-40(A) nor § 41-10-40(C) require compliance with the notice provision.

The only violation of the Act, therefore, was the nonpayment of wages accrued before the modification of the employment terms. By virtue of the modified agreement at the beginning of September, there were no further wages due after that point, and thus no cognizable failure to pay

through December 2014. In issuing an order to the contrary, the Trial Court artificially continued the terms of initial employment, amounting to an effective award of "prospective wages" for Gould that were never earned. Our courts have made clear that the Act does not apply to prospective wages. *Mathis* at 783.

D. Changes to terms of employment need not be in writing, regardless of § 41-10-100.

The last justification for the Trial Court ignoring the modified terms of employment is the reliance upon S.C. Code Ann. § 41-10-100, which provides "[n]o provision of this chapter may be contravened or set aside by a private agreement." Understood properly, this provision should merely prevent an employee from bargaining away any of the protections afforded under this chapter. It does not, however, modify the notice provision in S.C. Code § 41-10-30(A) to failures thereunder punitive. Nor does it act as some sort of employment protection provision that hamstrings an employer's absolute right to terminate an employee or modify the terms of employment such that termination can be avoided.

As shown, Defendant has not violated this Act in any manner other than the limited failure to pay a small amount of wages due prior to the change in employment terms in the beginning of September, 2014, and Gould expressly agreed to defer payment of those. The terms of the agreement that Defendants contend was reached does not waive any enforceable and applicable portions of the Act, nor does it even purport to do so. It merely calls for amended terms of employment, the type of agreement surely made every day across the state between employers and employees, without abrogation of the Act.

III. BECAUSE OF THE EVIDENCE PRESENTED REGARDING DISLOYALTY BY THE PLAINTIFF DURING THE PERIOD OF EMPLOYMENT, DID THE DEFENDANTS PRESENT SUFFICIENT EVIDENCE OF THE EXISTENCE OF EQUITABLE DEFENSES THAT PRECLUDED SUMMARY JUDGMENT FOR PLAINTIFF?

The Payment of Wages Act (the "Act") requires payment of "all wages *due*." S.C. Code Ann. § 41-10-40(A)(emphasis added). That "due" carries with it a whole host of considerations that may factor in to the amounts truly owed beyond mere salary and length of employment. The law is clear that the Act does not prohibit an employer from asserting valid defenses or disputing payment in good faith. *Futch v. McAllister Towing of Georgetown*, 335 S.C. 598, 518 S.E.2d 591 (1999). Despite that recognized ability of defendants in actions pursuant to the Act, none of the equitable defenses raised by Defendants were considered upon motion for summary judgment.

A. There was sufficient evidence to create a jury question as to how much compensation Gould should forfeit because of his disloyalty during employment.

Solicitation of an employer's customers "likely will constitute a violation of the duty of loyalty in almost every case." *Futch*, 335 S.C. at 609. That is true "particularly when combined with acts aimed at competing with the employer." *Id.* at 606. *Futch* clarified that South Carolina courts would follow the general rule that "an employee is not entitled to any compensation for services performed during the period he engaged in activities constituting a breach of his duty of loyalty even though part of those services may have been properly performed." *Id.* at 60-608. Further, the Court acknowledged that whether an employee "acted disloyally during a particular apportioned period or task [] is a question for the jury in most cases. In deciding whether an agent or employee acted disloyally, the jury must focus upon the particular circumstances of the case." *Id.* at 609.

In this matter, however, the trial court issued its order despite substantial evidence available that raises a genuine issue as to whether Plaintiff Gould engaged in activity that was sufficient to

constitute a breach of his duty of loyalty to MusclePharm, and the appropriate reduction in amount to which he was entitled as compensation from MusclePharm.

To wit, Defendant Ciccarelli testified in his deposition that Gould had carried around a book bag full of Fuel-branded apparel to hand out at trade shows he was attending at the expense of, and on behalf of, MusclePharm. (Def. Depo. p. 75, l. 19 – p. 76, l. 10). Plaintiff Gould himself testified at his own deposition and confirmed as much, acknowledging he had handed out Fuel-branded socks on more than one occasion while ostensibly acting on behalf of MusclePharm. (Gould Depo. p. 104, l. 22 – p. 105, l. 24; p. 106, ll. 6-15). Those surreptitious competitive efforts came to fruition apparently, as athletes with endorsement contracts with MusclePharm started showing up in the ring for their bouts wearing Fuel-branded socks in front of millions of spectators. (Def. Depo. p. 75, l. 24 – p. 76, l. 2; p. 87, ll. 12-17).

Questions also arose as to whether Gould was acting exclusively in the best interests of MusclePharm while he dealt with vendors. The shared concern amongst several employees of MusclePharm regarding potential kickbacks or other self-interested motivations was so widespread and definite that a meeting was held between Ciccarelli, Gould, and Ciccarelli's business partner had a phone conference about the subject. (Def. Depo. p. 77, l. 11 – p. 81, l. 23).

B. The order failed to acknowledge the legally cognizable defenses that supported by ample evidence to preclude grant of summary judgment.

In the trial court's order, this equitable defense related to disloyalty was dismissed as irrelevant because it did not occur during the disputed period of September through December 2014. (Order, p. 8). There is no case law cited that directly or indirectly supports that position. The only case cited is *Futch*, and merely for the proposition that compensation may be forfeited only during the asserted periods of disloyalty. But as stated above, the question of whether the

"employee acted disloyally during a particular apportioned period... is a question for the jury in most cases." *Id.* It was improper for the judge to definitively limit the alleged disloyalty to a period outside the September through December window of time on summary judgment, when inferences and conclusions are to be drawn in favor of the non-movant Defendant. That is especially true when the partial basis for the defense is the manner in which Gould dealt with his "good friend" vendors, something he admits to have continued to do during September – December 2014.

Further, the trial court ignored defense argument as to whether Gould had impliedly consented to changed compensation by continuing to work under the new arrangement, and thereby should be estopped from seeking damages for that change in terms merely because the case cited for the proposition predated the current Act. (Order, p. 3, footnote 5). However, as stated above, the Act (and its predecessors) does not prohibit an employer from asserting valid defenses, be they rooted in very recent jurisprudence or more dated opinions. *See Futch*, 335 S.C. at 605. The Supreme Court did not believe the principles outlined in *Facelli v. Southeast Mktg. Co.*, 284 SC. 44, 327 S.E.2d 338 (1985) were irrelevant in 2010 when it analyzed it in the context of a claim under the Act. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 698 S.E.2d 773 (2010). Although ultimately concluding that the facts in that case supported the trial court's finding of no implied consent, the Court noted that there were sufficient facts to create a genuine issue of material fact whether consent via continued employment had occurred. *Id.* at 781.

Both the disloyalty and implied consent arguments were presented with sufficient detail and evidence in support such that both should have operated as a bar to the grant of summary judgment issued in this matter.

IV. WAS THE TRIAL COURT'S AWARD OF TREBLE DAMAGES AND ATTORNEY FEES IMPROPER GIVEN THE BONA FIDE DISPUTE BETWEEN THE PARTIES AS TO AT LEAST A PORTION OF THE AMOUNT OF WAGES FOUND DUE AND UNPAID?

Under the Act, an employee "may" recover an amount equal to three times the amount of unpaid wages, plus costs and reasonable attorney's fees. S.C. Code Ann. § 41-10-80(C). Such awards are discretionary, and "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, 383 (1994). An employer "should not be penalized... for failure to pay wages upon assertion of a valid defense to payment." *Id.* at 98–99. Thus, a trial court must determine whether a "bona fide dispute" exists before awarding treble damages, costs, or fees. *Goodwyn v. Shadowstone Media, Inc.*, 408 S.C. 93, 98, 757 S.E.2d 560, 563 (Ct.App.2014). 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 v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 698 S.E.2d 773, 782 (2010). When reviewing such an award, the Court of Appeals "can take its own view of the facts." *Id.*

The trial court found that there was no bona fide dispute, but only did so after rejecting

- ample evidence regarding an agreement between the parties as to a change in the terms of employment;
- the clear language of the Act, including a misapplication of the notice provision in S.C. Code Ann § 41-10-30(A);
- evidence in support of the defense of breach of duty of loyalty, and
- argument in favor of the defense of implied consent, even though the allegedly dated authority cited in furtherance thereof had recently been applied by the State Supreme Court.

It is respectfully submitted that upon taking its own view of the facts and legal arguments set forth in great detail in this brief, the just and fair result would be to set aside the underlying order's multiplication of damages along with the award of attorney fees and costs in this action. They are clearly not warranted considering the arguably valid, but definitely thorough and well-reasoned, defenses raised herein.

Defendant Ciccarelli further acknowledges a very small amount of unpaid wages from before modification of the terms of employment at or around at the beginning of September 2014 but which Gould agreed to defer. However, the amount of unpaid wages as calculated by the trial court far exceeds that actual base amount owed, even before multiplication and addition of attorney fees. Therefore, even if the underlying award is multiplied and has attorney fees added, it would first be necessary to appropriately lower any amount found to have been "wages due" to the deferred amount that remained unpaid and therefore subject to potential enhancement.

CONCLUSION

The trial court erred in overlooking genuine issues of material fact as to Gould's claim and as to MusclePharm's defenses. To the extent anything was undisputed, it was the confirmed modification of employment terms, as demonstrated by the text messages exchanged.

Accordingly, Appellant prays for an order reversing the grant of summary judgment and remanding the matter the back to the trial court for further proceedings.

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March 31, 2017