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.

FINAL REPLY BRIEF

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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)).

In this matter, the trial court erred in overlooking genuine issues of material fact and inferences that should have been made in favor of Appellants, and as a result an order reversing the grant of summary judgment and remanding the matter the back for trial on factual issues in dispute is both appropriate and necessary.

1. **Notwithstanding limited facts acknowledged by Appellants, full consideration of all facts and defenses remaining in dispute precludes resolution on motion for summary judgment.**

An agreement at the outset of employment for $10k/month does not establish any term of employment or otherwise abrogate the at-will employment status of Gould. Gould never having been formally "terminated" is not conclusive of anything. The fact that he could have been, however, partially explains the Appellants' good faith belief as to the mutually-acceptable modification of employment terms that was reached between the parties.

Likewise, the failure to pay leading up to the August/September discussions via text was acknowledged, both at the time of the failure, within the deposition testimony included in the record on appeal, and in Appellants' brief. Nevertheless, it is not dispositive of anything in this matter. The full awarded amount established by the order on appeal went well beyond the much

smaller amounts acknowledged generally. Additionally, Appellants raised arguments that the exact amount was as yet unascertained, as equitable defenses raised would potentially minimize the amounts due to Gould, even if in the broad sense an admission that something was owed as of September is established.

Respondent highlights that Gould did some manner of work during the period of September - December, even though that does not definitively resolve any material issue regarding claimed wages due because (a) Gould acknowledged "my job is done as far as my duties over there," [R. p. 43] (b) some work was done without request by Defendant [R. p. 143], (c) Gould was there for his personal benefit, regardless of Defendant's gain or use, as he was arguably there exclusively to posture for employment with a successor entity, and (d) equitable defenses stand to re-define the amount actually due and owing, and thus "unpaid."

2. Text messages exchanged were sufficient to create a material fact in dispute.

On page five of its brief, Gould claims Defendant has acknowledged never giving "written notice of any pay reduction at all." However, the Defendant has repeatedly cited to the existence of text message exchanges with Gould as the basis for his argument that there was a reasonable basis upon which "written notice" could be found. That basis is sufficient to survive summary judgment, when all inferences must be drawn in favor of Defendant/Appellant.

The deliverance of claimed notice via text message, as opposed to a physically printed piece of paper, is not dispositive in Gould's favor. *Reyes v. Snowcap Creamery, Inc.* (D. Colo., 2013)(C/A No. 11-cv-02755-WJM-KMT, August 14, 2013)(received text messages sufficient to defeat summary judgment motion by defendant on basis of alleged failure by plaintiff to supply "written demand" required by Colorado wage claim statute); *Charter Twp. of Royal Oak v.*

Brinkley, (Mich. App. 2017)(unpublished opinion per curiam of the Court of Appeals, issued May 18, 2017)(Opinion No. 331317)(noting "lack of clarity concerning where emerging technology such as text messages fits into existing statutory definitions concerning 'written requests' or 'writings'" and "there is arguable merit to the claim that a text message would satisfy the "in writing" requirement"); *See Canal Ins. Co. v. Caldwell*, 524 S.E.2d 416 (Ct. App. 1999)(fax from opposing counsel with information merely *about* an order, without a copy of order being provided, was sufficient "written notice" to trigger deadline for filing appeal pursuant to Rule 203, SCACR); *See also Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC*, 413 S.C. 642, 776 S.E.2d 575 (Ct. App. 2015)(no physical paper required for sufficient "written notice" to be delivered, as email with attached copy of order was sufficient); *Cf. Zajac v. Red Wing, LLC*; (D.S.C., 2016)(C/A: 2:16-cv-1856-PMD)(issued October 4, 2016)(Approving text message as appropriate means of delivery for notice to potential collective action claimants' ability to opt-in to federal Fair Labor Standards Act litigation).

3. Respondent misapplies certain Payment of Wages Act provisions and fails to address extensive argument presented by Appellant as to critical portions of the Act that govern limitations on availability of damages recovery.

Appellant's brief set forth argument regarding the proper application of S.C. Code § 41-10-100, which Respondent has apparently labeled a "consent defense." (Resp. Br. P. 9). However, Appellants' discussion of an agreement between the parties was regarding revised terms of employment, not the waiver of any protections afforded by the Act. The agreement(s) in question did not set aside any portion of the Act, which remained operative within its proper boundaries, but which also remained inapplicable to the present circumstances discussed in the underlying matter.

Respondent further asserts in its brief that "The Wage Payment Act provides that any downward change in the rate of pay of an employee is not effective without seven days' advance written notice." (Resp. Br. P. 6). Respondent cites support for that assertion via S.C. Code § 41-10-30. However, the statute does not say failure to provide notice renders a change ineffective. The consequences for failure[1] to meet the requirements of S.C. Code § 41-10-30 are not provided in that section at all. The use of the word "effective" in the section is merely used as a timing mechanism for the giving of written notice, not a potential nullification of an act.

An expansive reading of § 41-10-30 as requested by Respondent, at most, might delay effectiveness of a change for a period of seven days to balance the at-will employment default in South Carolina with the statutory alteration thereto made by the SC Payment of Wages Act. But treating § 41-10-30 as requiring delivery of a printed paper or else employment continues until employment definitively ends completely (and without regard to duty or performance changes), is an absurd expansion of the statutory provision without basis in its clear text.

The actual statutory text setting for consequences for a failure are established and defined in separate sections of the Wage Payment Act, namely § 41-10-40 and §§ 41-10-80(A) and (C). Those sections, and their inapplicability as a basis for the relief granted in the underlying order on appeal, was specifically discussed extensively in Appellants' brief. (*See* App. Br. Section II, pages 10 - 15).

Those two particular provisions of the Act are nevertheless notably, and completely, absent from the Respondent's brief. The failure to address those arguments and statutory text that is

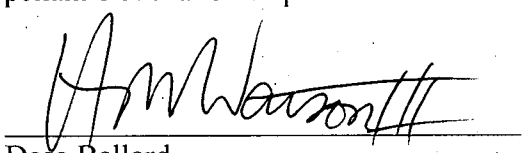
[1] Appellants contend, as has been discussed in depth previously, that there is a genuine issue as to whether adequate written notice was provided to Gould. But even assuming a failure on Appellants' part, Respondent's analysis of the claimed consequence of such a failure ignores the actual text of the statute, as discussed in Appellants' brief and this reply brief.

controlling in the issues set before this Court should therefore be treated in the manner favored by Appellant. *See First Union Nat'l Bank v. FCVS Comm'ns*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (if respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct), *rev'd on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997).

CONCLUSION

The trial court erred in overlooking genuine issues of material fact regarding the alleged existence of modified terms of employment that affect the nature and amount of wages due. Appellants also fairly raised equitable defenses that constitute questions to be appropriately resolved at trial by a jury, not on summary judgment. Finally, Appellant raised and discussed extensively the failures of the lower court to properly interpret limitations upon recovery set forth in the Wage Payment Act, which have been unopposed by Respondent's brief, and which therefore should be accepted by this Court as a separate basis upon which to reverse and remand.

Accordingly, for the reasons set forth in Appellants' opening brief and hereinabove, the Circuit Court order granting summary judgment should be reversed and the matter remanded for further proceedings that do not improperly deprive Appellant's of trial on disputed factual issues.



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July 21, 2017

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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