THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge
Edward W. Miller, Circuit Court Judge

Common Pleas Case No. 2017-CP-23-03720

Appellate Case No. 2018-000207

DARRIN VANDER TOORN,

Respondent,

v.

BILLETER RECRUITING, LLC, and WILLIAM ANCAR,

Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in refusing to set aside the entry of default for Appellants Billeter Recruiting, LLC, and its president William Ancar, especially where the complaint alleged that Mr. Ancar is a disabled veteran?
2. Did the trial court err in entering judgment for $107,061:
    a. Where the judgment included damages under the Payment of Wages Act even after the period beginning May 26, 2017, even though Mr. Vander Toorn admitted that he did not perform any labor after that day;
    b. Where the judgment included damages for commissions without a finding from the trial court that the commissions were actually attributable to labor performed; and
    c. Where judgment included treble damages that the trial judge erroneously thought were mandatory rather than discretionary under the Payment of Wages Act?

STATEMENT OF THE CASE

On June 8, 2017, Respondent Darrin Vander Toorn filed a complaint in the Greenville County Court of Common Pleas against Appellants Billeter Recruiting, LLC; and William Ancar. [Compl.]. The Complaint asserted three causes of action: breach of contract, breach of contract accompanied by fraudulent act, and violation of South Carolina's Payment of Wages Act, S.C. Code § 41-10-10. [*Id.*].

On July 12, 2017, on motion of Mr. Vander Toorn, the Circuit Court entered a default for both Billeter Recruiting and Mr. Ancar, because they had not responded to the complaint within thirty days after service. [Motion for Entry of Default; Order of July 12, 2017].

On September 1, 2017, Mr. Vander Toorn filed a motion for a default judgment for in-chambers consideration. [Motion for Default Judgment]. Circuit Court Judge Robin Stilwell, however, denied the motion in chambers on September 12, 2017. [Order of September 12, 2017].

On October 17, 2017, Appellants filed a motion to set aside their default. [Motion to Set Aside Default].

On November 15, 2017, Circuit Court Judge Perry Gravely denied the motion. [Order of Nov. 15, 2017]. Because proper notice of a default damages hearing had not

been provided, the judge ordered that a damages hearing be scheduled with proper notice. [*Id.*].

Following a damages hearing held before Circuit Court Judge Edward Miller, the trial court entered a default judgment against Billeter Recruiting and Mr. Ancar for $107,061.00 inclusive of fees and costs. [Default Judgment]. Judge Miller's order was electronically docketed on January 23, 2018. [*Id.*].

Billeter Recruiting and Mr. Ancar served their notice of appeal on January 29, 2018, [Original Notice of Appeal], which they amended on February 21, 2018, [Amended Notice of Appeal].

STATEMENT OF ADDITIONAL FACTS

I. The Complaint

In the Complaint, Mr. Vander Toorn alleged that Mr. Ancar is "a disabled veteran and operates Billeter Recruiting, LLC, and Billeter Professional Solutions as Service-Disabled Veteran Owned Small Business...." [Compl. ¶6]. Mr. Ancar serves as Billeter Recruiting's president. [*Id.* ¶7].

Mr. Vander Toorn alleged that he was hired as Billeter Recruiting's vice-president pursuant to a six-month written contract, which was attached as an exhibit to the Complaint. [*Id.* ¶10 & Compl. Ex. A]. His duties under the contract were, among other

things, to provide a "Contract And/Or Contracts" with "Fluor-Southern Companies, Fluor-NRG, [and] Day-Zimmermen." [*Id.* at Ex. A at 2]. Under the "compensation" section of the contract, Billeter Recruiting promised to pay Mr. Vander Toorn "a six [-] month salary of $60,000 payable monthly...." [Compl. Ex. A ¶4]. *See also* [Compl. ¶ 12 ("Under the Agreement, Ancar and Billeter were obligated, among other things, to pay Mr. Vander Toorn...a salary of $10,000 per month, to be paid on the 15th of each month.....")]. Via a separate item entitled "commission payments," Billeter Recruiting also promised to "make commission payments to Darrin Vander Toorn based on Gross Profits contracts he provide[s]. This commission will be paid 30 days after the payment of any invoice from a client provided by Darrin Vander Toorn." [Ex. A ¶5]. The commissions were subject to a schedule, with the commission determined as a percentage of the gross profit of the contracts that "he s[old] for Billeter." [*Id.* ¶¶5(A)(2-4)]. Furthermore, Mr. Vander Torn would receive a $12,000 signing bonus, subject to claw back "if no contract is provided within the [term] of this Agreement." [*Id.* ¶5(A)(1)]. The six-month contract was scheduled to begin on January 3, 2017. [*Id.* ¶12].

According to the Complaint, Mr. Vander Toorn was willfully not paid his May 2017 "salary." [Compl. ¶26]. Instead, Mr. Vander Toorn averred that, on May 26, 2017, he received notice from Mr. Ancar that Mr. Vander Toorn "was 'suspended' be-

cause Ancar was unable to clear Mr. Vander Toorn from some alleged contract breaches and/or fraud that were under investigation." [*Id.* ¶29]. Further, Mr. Vander Toorn alleged that his "final payment of $10,000 [would]...become due and owing June 15, 2017," [*Id.* ¶30]—one week after Mr. Vander Toorn filed his Complaint and thus not yet owing at the time of filing.

Mr. Vander Toorn alleged that he had tried to resolve his wage claim through a complaint with the South Carolina Department of Labor, Licensing and Regulation ("LLR"). [Compl. ¶32]. In the proceedings there, Mr. Vander Toorn averred that Mr. Ancar had falsely claimed that the $12,000 signing bonus had been paid in satisfaction of the May 2017 salary obligation. [*Id.*]. The Complaint made no allegation, however, that LLR had determined any improper wage withholding had occurred.[1]

II. The Denial of the Motion to Set Aside the Entry of Default

Judge Gravely presided over the hearing on the motion to set aside the default. [Order of Nov. 15, 2017]. At the hearing, counsel for Mr. Ancar and Billeter Recruiting argued that Mr. Ancar's disability, owing to "a traumatic brain injury [from] military service in 2009", had prevented him from timely responding to the summons that he

[1] If LLR determines that an employer has wrongfully delayed, withheld, or diverted wages, LLR "must...assess[] a civil penalty of not more than one hundred dollars for each violation." S.C. Code § 41-10-80(B).

had received on his own behalf and on behalf of Billeter Recruiting. *See* [Nov. 8, 2017 Tr. 2-4.]. Counsel explained that Mr. Ancar's brain injury causes him to experience short-term memory loss, and that it took his wife stumbling across the Summons and Complaint to result in counsel being hired. [*Id.* at 9-10].

Counsel for Mr. Ancar and Billeter Recruiting indicated that, if allowed to proceed, they would raise potential defenses on the merits, including breaches of Mr. Ancar's employment contract and misappropriation of confidential business information. [*Id.* at 11-12].

At the hearing, however, Judge Gravely indicated that he would not consider counsel's arguments because they were not supported with affidavits or witness testimony. [*Id.* at 8-12]. Judge Gravely's written order denying the motion to set aside the default reiterated that view that affidavits or testimony was required but lacking:

> This matter comes before the Court upon Defendant's Motion to Set Aside Default. At the hearing on November 8, 2017, the Defendant's attorney argued that the Default should be set aside because of defendant's health issues and other grounds, but no affidavits or sworn testimony were presented supporting this argument or any other basis to set aside the default. The Court finds that the Defendant failed to show good cause to set aside the Default and the Defendant's Motion is denied. The Plaintiff had filed a Motion for Damages, but it did not appear that proper notice of the hearing had been provided as required by Rule 55, SCRCP and therefore this Motion shall be rescheduled with notice to all parties.

[Order of Nov. 15, 2017].

III. The Entry of the $107,061 Default Judgment

The parties appeared for a default damages hearing before Judge Miller. At the beginning of the hearing, Mr. Vander Toorn's counsel advised that he was "proceeding under the cause of action that [he] filed under the South Carolina Payment of Wages Act....", [Dec. 5, 2017 Tr. 5], thus abandoning the two other counts alleged in the Complaint.

With respect to the Count under the Payment of Wages Act, Mr. Vander Toorn offered only one witness: himself.[2]

On his brief direct, he explained that he was seeking (1) $20,000 in unpaid salary for the months of May and June 2017; (2) unpaid commissions of $11,051.40 on contracts with "Fluor and Day and Zimmerman," and (3) prejudgment interest. [Dec. 5, 2017 Tr. 6-7]. Collectively those items totaled $33,767.40 under his calculations. [*Id.* at 8]. Although he said that he would like the judge to treble the damages, he did not explain why he felt that he was entitled to that additional $67,534.80. *See* [*id.*].

On cross-examination, Mr. Vander Toorn admitted that, under the terms of his employment, he understood himself to be entitled to his salary on the 15th of each month. [*Id.* at 11, 12.]. He admitted, however, that Mr. Ancar and Billeter Recruiting sus-

[2] He also introduced a fee affidavit from his counsel.

pended him on May 26th. [*Id.* at 13-14]. From that date onward, he did not perform any services for Mr. Ancar or Billeter Recruiting. [*Id.* at 15-16]. Furthermore, with respect to the commissions on contracts with Fluor that were included in his direct testimony, he was seeking commission on "every single Fluor contract with Billeter regardless of whether [he] was responsible for bringing in that contract or not[.]" [*Id.* at 17].

Judge Miller awarded Mr. Vander Toorn everything he asked for at the hearing. Judge Miller explained that he believed himself precluded, in light of the default, from considering Mr. Ancar's and Billeter Recruting's arguments that Mr. Vander Toorn's unpaid salary was a not "wage" within the meaning of the Payment of Wages Act, that not all of the commissions were attributable to Mr. Ancar, and that the non-payment was not willful. [Jan. 23, 2018 Order at 3-4]. Because Mr. Ancar and Billeter Recruiting "did not object or contest that the Plaintiff had not been paid the sums he testified he was not paid[....,] object or contest that Billeter received the revenues entitling him to commissions....," and could not themselves offer any evidence of good faith, "there is nothing over which this Court must exercise discretion." [*Id.* at 4]. Accordingly, Judge Miller approved all the damages sought and ordered them trebled, for a total of $101,302.20. [*Id.*]. Further, he awarded full fees and costs of $5,758.80. [*Id.*] Thus, the total default judgment was $107,061.00.

ARGUMENT

"[C]ourts should closely scrutinize default judgments to prevent harsh results and drastic action. It is the policy of the law to favor the trial of cases on the merits." *Lewis v. Congress of Racial Equality*, 275 S.C. 556, 560 (1981). As shown below, this Court should vacate the order denying Mr. Ancar and Billeter Recruiting's motion to set aside the default. The Court should, alternatively, reverse in part and vacate in part the damage award in the default judgment.

I. Issue One: The Wrongful Denial of the Motion to Set Aside Default.

A. Standard of Review

This Court will review for an abuse of discretion a denial of a motion to set aside a default. *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 606 (2009) (citation omitted). "An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Id.* (citation omitted).

B. Especially Given that Mr. Ancar Is a Disabled Veteran, Good Cause Existed to Set Aside the Default.

South Carolina public policy "favor[s] the disposition of issues on their merits rather than on technicalities." *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 511 (Ct. App. 2001) (citations omitted). Because where, as here, a party moves to set

aside an entry of default rather than an actual judgment, countervailing considerations of finality do not come into play. *See Sundown*, 383 S.C. at 608 (explaining that the drafters of the Rules of Civil Procedure intentionally chose "to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later, than a clerk's entry of default"). Thus, a default can be set aside for mere "good cause," R. 55(c), SCRCP.

Examples of good cause sufficient to explain a default include "mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, [or] misrepresentation," but our Supreme Court has specifically held that "[n]o trial court should ever find good cause lacking based solely on the absence" of one of those potential examples. *Sundown*, 383 S.C. at 608.

"Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Sundown*, 383 S.C. at 607-08.

Here, the trial court committed an "error of law" and thus "abus[ed] [its] discretion," *id* at 606, when it refused to set aside the default *solely* because Mr. Ancar and Billeter Recruiting had not supported their motions with affidavits or in-court testimo-

ny to substantiate Mr. Ancar's claim of disability. Because the Complaint itself specifically alleged that Mr. Ancar is "a disabled veteran," [Compl. ¶6], no further proof is required to establish that fact in the litigation; the allegation is a binding judicial admission. *See, e.g.*, R. 8(d), SCRCP ("Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.").

Because the court below erred at the outset of its analysis, it did not proceed to consider the timing of the motion, the existence of potentially meritorious defenses, and the potential for prejudice to the plaintiff, as *Sundown* requires. 383 S.C. at 608. This Court must, therefore, remand for the trial court to consider them, because remand is not futile as a matter of law. *See, e.g.*, *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465 (Ct. App. 1989) (remanding for the trial court to make findings concerning those factors).

First, the three-month delay between the default and the motion to set aside was short—particularly given that Mr. Ancar and Billeter Recruiting filed their motion to set aside *before* they received "proper notice of [a default damages] hearing...as required by Rule 55, SCRCP." [Order of Nov. 15, 2017]. *See, e.g.*, *Wham*, 298 S.C.at 463 (remanding for proper good-cause balancing where record showed that the default-

ing party moved to set aside default "[u]pon receipt of the notice of [default] hearing").

Second, potentially meritorious defenses exist given that—as alleged in the Complaint itself—Mr. Ancar said that he had "'suspended' [Mr. Vander Toorn] because Ancar was unable to clear Mr. Vander Toorn from some alleged contract breaches and/or fraud that were under investigation." [Compl. ¶ 29]. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 607-08 (1999) ("The general rule is 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." (quotation omitted); *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 594 (Ct. App. 2008) ("Where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom all liability for the nonperformance rests." (quotation omitted)).[3] Thus, it is not surprising that the Complaint alleges that Mr. Vander Toorn first turned to LLR for recovery

[3] The bar for what qualifies a sufficiently "meritorious" is quite low:

> A meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.

Graham v. Loris, 272 S.C. 442, 453 (1978) (citation omitted).

but, given the need to have filed the action, LLR evidently found nothing actionable. *See* [Compl. ¶ 32].

Finally, as for prejudice to the plaintiff, none exists here. *See generally Johnson v. Dayton Elec. Mfg. Co.*, 140 F.3d 781, 785 (8th Cir. 1998) ("As numerous decisions make clear, prejudice may not be found from delay alone or from the fact that the defaulting party will be permitted to defend on the merits." (citations omitted).

Because the court below committed an error of law, this Court should vacate the order denying the motion to set aside the entry of default.

II. Issue Two: The Excessive $107,061 Default Judgment

A. Standard of Review

On review of the amount of actual damages, this Court reviews for errors of law and asks whether any evidence supports the amount awarded. *E.g.*, *Oaks at Rivers Edge Prop. Owners Ass'n v. Daniel Island Riverside Developers, LLC*, 420 S.C. 424, 446 (Ct. App. 2017) (citation omitted). But because the decision as to whether to impose treble damages under the Payment of Wages Act is one that sounds in equity, this Court is entitled to "take its own view of the facts" as to the propriety of any trebling. *O'Neal v. Intermedical Hosp.*, 355 S.C. 499, 510 (Ct. App. 2003) (citation omitted) (reversing award of treble damages under the Payment of Wages Act).

B. No Evidence Supports Damages for any Salary After May 26, 2017, Because Mr. Vander Toorn Admitted That He Did Not Perform any Labor.

While Mr. Ancar's and Billeter Recruiting's failure to answer the Complaint is deemed an admission of the facts alleged in it, those deemed admissions do not extend "to the amount of damage." R. 8(d), SCRCP. A defendant's default thus never excuses a plaintiff from proving the amount of his damages. *Renney*, 275 S.C. at 567 ("Whether a defendant is or is not in default, it is incumbent upon the judge and/or the jury to make a judicial determination of the amount recoverable based on the proof.").

By proceeding only under the Payment of Wages Act, Mr. Vander Toorn was limited to collecting those amounts that he could show were unpaid "wages." S.C. Code § 41-10-80(D). And "wages" are statutorily defined to be only those reflecting payment for "labor rendered." S.C. Code § 41-10-10(2). Thus, where no labor is actually rendered, no "wages" are owed (and thus cannot be trebled). *See Matthews v. City of Greenwood*, 305 S.C. 267, 272 (Ct. App. 2001) (holding that paid leave for military service for public employees falls outside the Payment of Wages Act because "it is not recompense for work rendered...at all.").

Here, Mr. Vander Toorn conceded that he did not perform any services after May 26, 2017. [Dec. 5, 2017 Tr. 15 (testifying that "[t]here's no provision for a suspension, so not providing services was not my call); 15-16 ("Q ... [A]fter May 26th when the

suspension, again right, wrong, or indifferent was given to you, you no longer provided any services to the Defendants; is that correct? A I wasn't asked to."). Nonetheless, the court below awarded Mr. Vander Toorn his full salary for the months of May and June 2017. [Jan. 23, 2018 Order at 2]. It was error to have done so; proration was required beginning May 26.

It was also error to have deemed the June $10,000 payment as damages recoverable under the Wage Payment Act for another reason. At the time Mr. Vander Toorn filed his Complaint, the June payment was not yet even arguably due. Thus, no damages can be owed under the Act—under the facts as alleged in the Complaint—with respect to the June payment. *Compare* [Compl. ¶ 30 ("Mr. Vander Toorn's final payment of $10,000.00 will...become due and owing June 15, 2017")], with [Compl. ¶52 ("Billeter and Ancar have failed to pay wages as set forth above and have therefore committed violations of the Act.")]. *See generally Masters v. Rodgers Dev. Group*, 283 S.C. 251, 254 (Ct. App. 1984) ("A party seeking a default judgment is entitled to only such relief as is framed by his pleading. . . . It follows that if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error." (quotation omitted)).

Accordingly, this Court should reverse the damage award (including trebled dam-

ages) for the period following May 26, 2017.[4]

C. A Remand Is Required for the Trial Court to Determine Which Commissions from Fluor Resulted from Mr. Ancar's Labor.

As indicated above, the Payment of Wages Act only authorizes recovery of damages for unpaid amounts resulting from "labor rendered." S.C. Code § 41-10-10(2). At the hearing, Mr. Ancar testified that his unpaid commission figure included commissions on every Fluor contract "regardless of whether [he] was responsible for bringing in the that contract or not[.]" [Dec. 5, 2017 Tr. at 17]. Judge Miller, however, wrongly believed that he was precluded from considering whether Mr. Vander Toorn had proven that the commissions at issue were the result of Mr. Vander Toorn's labor. *See* [Jan. 23, 2018 Order at 4]. The sine qua non of a damage award under the Payment of Wages Act is the amount of labor actually rendered to the employer. *See Masters* 283 S.C. at 254.

Because the judge below committed an error of law with respect to the award of commissions, the damage award cannot stand. This Court should vacate the portion of the award concerning the commissions and direct the court below to determine those

[4] The $10,000 wage for May comes to $322.58 per day. A five-day reduction equals $1,612.90, which when trebled equals $4,838.71. The $10,000 unearned June wage, when trebled, equals $30,000. A reduction of at least $31,612.90 is thus required for this error.

commissions that Mr. Vander Toorn proved by a preponderance of the evidence were actually the results of his labor.

D. A Discretionary Award of Treble Damages Is Not Appropriate.

The judge below thought that he had "nothing over which [he] must exercise discretion," when it came to whether to trebling of amounts owed under the Payment of Wages Act. [Jan. 23, 2018 Order at 3]. Not so. The General Assembly intentionally chose to make trebling of any award a matter for judicial discretion. S.C. Code § 41-10-80(C) (providing that "the employee may recover in a civil action an amount equal to three times the full amount of the unpaid wages"); *Rice v. Multimedia, Inc.*, 318 S.C. 95, 98 (1995) ("[B]y using 'may', rather than 'shall', the legislature has provided that the penalty is discretionary...").

As a matter of law, it is an abuse of discretion to treble an award where the employer had a bona fide dispute as to the need to pay the wages. *Id.* Here, the Complaint specifically alleges that Mr. Ancar informed Mr. Vander Toorn that he was suspended without pay in light of "contract breaches and/or fraud that were under investigation." [Compl. ¶ 37]. Because that allegation is "conclusive as against the pleader," *Elrod v. All*, 243 S.C. 425, 436 (1964), it was error to award treble damages when Mr. Ancar and Billeter Recruiting had a reason for the non-payment. *See generally O'Neal*, 355

S.C.at 509 ("[A] finding that an employee is entitled to recover unpaid wages is not equivalent to a finding that there existed no bona fide dispute as to the employee's entitlement to those wages."). And even if he were not already bound by that pleading averment, Mr. Vander Toorn did not offer any evidence at the damages hearing of a lack of good faith for the failure to timely pay.

Furthermore, given that trebling "is not mandatory," *Rice*, 318 S.C. 95, 99, Mr. Ancar and Billeter Recruiting respectfully suggest that trebling in a default cause is "unjust and harsh," *id.* at 98, when there has been no adversarial testing of the entitlement to back wages in the first instance.

Accordingly, this Court should reverse the award of treble damages.

III. Request for Oral Argument

Appellants believe that, in light of the large judgment entered by default, the issues presented in this appeal are appropriate for oral argument.

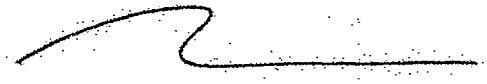
CONCLUSION

For the foregoing reasons, this Court should vacate the order denying the motion to set aside the default. To the extent, on remand, the court below does not set aside the default, this Court should (a) reverse the award of damages for the period following May 26, 2017; (b) vacate the damages attributable to the commissions and remand for

determination of those commissions owed as a result of work actually performed; and (c) reverse the award of treble damages.

Dated this 18th day of June, 2018.

BILLETER RECRUITING, LLC
WILLIAM ANCAR



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