

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

J. Cordell Maddox, Circuit Court Judge

Case No. 2013-CP-23-05424

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SC Court of Appeals

Shadia Hewitt, Respondent,

v.

The Shaw Corporation d/b/a Shaw's Pharmacy and
Charles Cleburn Turner, Defendants,

of whom The Shaw Corporation d/b/a Shaw's Pharmacy
is the Appellant.

INITIAL BRIEF OF APPELLANT

November 19, 2018

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	<u>2</u>
1. The parties and their relationship.	2
2. Procedural history.....	2
A. Hewitt sues Shaw's Pharmacy and Turner.	2
B. Hewitt successfully moves for summary judgment based on an earlier LLR proceeding.....	3
C. Shaw's Pharmacy moves the circuit court to reconsider its award of treble damages and clarify its earlier order	5
STANDARD OF REVIEW	6
ARGUMENT.....	6
ISSUE.....	7
Did the circuit court err in awarding treble damages to Hewitt?	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES

<i>Morin v. Innegrity, LLC</i> , 819 S.E.2d 131 (2018)	6, 8, 9
<i>O'Neal v. Intermedical Hosp. of South Carolina</i> , 355 S.C. 499, 585 S.E.2d 526 (Ct. App. 2003)	9
<i>Rice v. Multimedia, Inc.</i> , 318 S.C. 95, 456 S.E.2d 381 (1995).....	8
<i>Ross v. Ligand Pharm., Inc.</i> , 371 S.C. 464, 630 S.E.2d 460 (Ct. App. 2006)	7
<i>Temple v. Tec-Fab, Inc.</i> , 381 S.C. 597, 675 S.E.2d 414 (2009).....	8, 9, 10

STATUTES

South Carolina Payment of Wages Act, S.C. Code Ann. §41-10-10, <i>et seq</i>	3, 7
S. C. Code Ann., §41-10-80(C)	8

STATEMENT OF ISSUE ON APPEAL

Did the circuit court err in awarding treble damages to Hewitt under the South Carolina Payment of Wages Act?

STATEMENT OF THE CASE

1. The parties and their relationship.

Hewitt is a former employee of The Shaw Corporation d/b/a Shaw's Pharmacy ("Shaw's Pharmacy"). Turner is the owner of Shaw's Pharmacy. Hewitt claims that Shaw's Pharmacy and Turner owe Hewitt wages that she alleges were not paid to her during a two-year period while she was employed by Shaw's Pharmacy. Shaw's Pharmacy and Turner deny these allegations.

2. Procedural history

A. Hewitt sues Shaw's Pharmacy and Turner.

On October 7, 2013, Hewitt sued Shaw's Pharmacy and Turner alleging (1) failure to pay wages in the amount of \$96,200; (2) breach of contract; and (3) unjust enrichment. (Compl., ¶16-32, pp. 3-4). Relevant to the instant appeal, Hewitt alleges that Shaw's Pharmacy and Turner only occasionally paid her the wages she was owed during a two-year period from July 2011 until July 2013. (Compl., ¶7-12, pp. 1-3). The Complaint alleged that the parties had an arrangement whereby Hewitt would be paid \$800.00 in "salary" for up to 20 hours per week and \$40.00 per hour for any additional hours worked. (Compl., ¶7, p. 1-2).

Shaw's Pharmacy and Turner have maintained throughout the case that Hewitt was paid all the wages she was owed and that they do not owe any additional wages to Hewitt. Paragraph 7 of Defendants' Answer and Counterclaims denied Hewitt's allegations regarding the structure of her

wage payment arrangement with Shaw's Pharmacy. (Answer at ¶ 7, p. 2). Paragraph 12 of Defendants' Answer and Counterclaims states: "Defendants further state affirmatively *that Plaintiff was paid all salary and expenses due to her.*" (See Answer at ¶12, p.3) (emphasis added.) Likewise, Paragraph 9 of the "Additional Defenses" portion of Defendants' Answer and Counterclaims states: "Plaintiff's Cause of Action against Defendants for violation of the South Carolina Payment of Wages Act, S.C. Code Ann. §41-10-10, *et seq.*, is *barred because Defendants paid all wages due to Plaintiff.*" (Answer, ¶9 of Additional Defenses, p. 6) (emphasis added).

B. Hewitt successfully moves for summary judgment based on an earlier LLR proceeding.

On or around December 15, 2014, Hewitt filed a two-paragraph Motion for Complete or Partial Summary Judgment contending that "there is no disputed issue of material fact that the Defendants owe Plaintiff wages" and that "liability and damages have been previously determined in another proceeding." (Mot. For Complete or Partial Summ. J., p. 1). The Motion did not reference any testimony, evidence, or case law, nor did it attach any exhibits. At a hearing on February 10, 2015, counsel for Hewitt argued that an earlier LLR proceeding between Hewitt and Shaw's Pharmacy should be given preclusive effect and should result in summary judgment in Hewitt's favor on her wage payment claim.¹ No witnesses testified at this hearing.

¹ The circuit court has been unable to locate the transcript of this hearing. The arguments made by the parties at this hearing are largely embodied in

Shaw's Pharmacy and Turner argued in opposition to the Motion for Summary Judgment that the LLR proceeding between Hewitt and Shaw's Pharmacy should not be given preclusive effect because the parties did not have a full and fair opportunity to litigate the relevant issues at the LLR stage. (Def. Resp. in Opp'n To Mot. For Summ. J., pp. 4-5). In support of their Response, and to show that a genuine issue of material fact existed as to Hewitt's wage payment claim, Shaw's Pharmacy and Turner submitted as attached Exhibit B an Affidavit of Charles Cleburn Turner executed on February 4, 2015, in which Turner unequivocally reiterated his position that Shaw's Pharmacy paid the Hewitt all the wages that were due to her, stating: "Shaw's Pharmacy fully paid Ms. Hewitt all the wages that were due to her for the work she performed during her employment with Shaw's Pharmacy. Shaw's Pharmacy has not withheld any wages due to Ms. Hewitt, nor do I personally owe Ms. Hewitt any wages." (Aff. of Charles Cleburn Turner, Exhibit B to Def. Resp. in Opp'n To Mot. For Summ. J., ¶4, p. 1).

On June 19, 2015, Hewitt submitted to the Court a proposed order granting her Motion for Partial Summary Judgment. (June 19, 2018 email from Tonya D. Hendricks, Paralegal to Judge Maddox (forwarded same day by Hendricks to John Merrell) with attached proposed Order Granting Plaintiff's Mot. for Partial Summ. J.). On June 30, 2015, Shaw's Pharmacy filed objections to this proposed order, noting in part its objection to the proposed

the Transcript of Record of the April 24, 2017 hearing on Shaw's Pharmacy's Motion to Reconsider.

award of treble damages, as well as an objection to several statements of fact in the proposed Motion. (Def. Objections to Plaintiff's Proposed Order Granting Mot. for Summ. J., pp. 1-3, 6-9.) Despite these objections, the circuit court signed Hewitt's proposed order without any revisions on August 28, 2015. (Order Granting Plaintiff's Mot. for Partial Summ. J.). The order held that Shaw's Pharmacy would be liable for \$10,400 in unpaid wages during the time period of May 3, 2013 and July 26, 2013. The circuit court's order stated in summary fashion that the unpaid wages "should be trebled, pursuant to the above-referenced code section." (Id. p. 9).

C. Shaw's Pharmacy moves the circuit court to reconsider its award of treble damages and clarify its earlier order.

On September 14, 2015, Shaw's Pharmacy and Turner filed a Motion to Reconsider Award of Treble Damages, Clarify Prior Ruling, and Confirm that Wage Payment Claim has been Adjudicated in its Entirety ("Motion to Reconsider"). (Mot. To Reconsider Award of Treble Damages, Clarify Prior Ruling, and Confirm that Wage Payment Claim Has been Adjudicated in its Entirety). Shaw's Pharmacy and Turner asked the circuit court to reconsider its award of treble damages on the grounds that there was a bona fide dispute over whether wages were due. Shaw's Pharmacy and Turner argued:

There is clearly a bona fide dispute in this case, and there is no evidence whatsoever of willfulness by the Defendants. Defendants have consistently disputed they owe any wages to the Plaintiff, including in the LLR documents upon which Plaintiff relies, Defendants' Answer in this lawsuit, and Defendants' other filings in this case, including the af-

fidavit of Charles Cleburn Turner that was previously filed with the Court. Plaintiffs have presented no evidence to support a finding that there was *not* a bona fide dispute as to unpaid wages. Additionally, the Court's ruling does not contain any discussion regarding whether there was a bona fide dispute as to wages owed. Therefore, the imposition of treble damages is improper and Defendants respectfully request that the Court reconsider its award of treble damages.

Id., p. 2.

On April 24, 2017, a hearing was held on Shaw's Pharmacy's Motion to Reconsider where counsel for the parties argued their respective positions. (Transcript of Record, hearing held April 24, 2017). On July 27, 2018, the circuit court reaffirmed its award of treble damages by issuing an order denying the portion of Shaw's Pharmacy's Motion to Reconsider that argued treble damages were inappropriate. (Order Revising and Clarifying Order for Partial Summ. J., pp. 1-2). The circuit court also clarified that its order was for summary judgment on all of Hewitt's claims relating to unpaid wages and therefore, that Hewitt's wage payment claim had been adjudicated in its entirety. Shaw's Pharmacy now appeals the circuit court's award of treble damages.

STANDARD OF REVIEW

In reviewing an award of treble damages by the trial court, the Court of Appeals may find its own facts. *Morin v. Innegrity, LLC*, 819 S.E.2d 131, 139 (2018) ("In reviewing the award [of treble damages], we may find our own

facts.”) (citing *Ross v. Ligand Pharm., Inc.*, 371 S.C. 464, 471, 630 S.E.2d 460, 464 (Ct. App. 2006)

ARGUMENT

The circuit court’s order awarding treble damages should be overturned because the circuit court did not evaluate whether there was a bona fide dispute over unpaid wages or whether wages were withheld unreasonably and in bad faith. In the alternative, the circuit court’s award of treble damages should be overturned because there was insufficient evidence to support a finding that there was no bona fide dispute and that wages were withheld unreasonably and in bad faith. The circuit court appears to have automatically assessed treble damages which is contrary to the applicable standard for awarding treble damages under the South Carolina Payment of Wages Act (“Act”).

ISSUE

Did the circuit court err in awarding treble damages to Hewitt?

In its original order granting summary judgment, the circuit court ruled in conclusory fashion that unpaid wages “should be trebled, pursuant to the above-referenced code section.” The circuit court failed to apply any standard to determine whether an award of treble damages was appropriate under the Act. The order does not state that there was no bona fide dispute over the unpaid wages, nor does it cite any record evidence to suggest that no

bona fide dispute existed. The order also does not discuss whether wages were withheld unreasonably and in bad faith. The circuit court's failure to consider these factors was a clear violation of the law in South Carolina and as such, the award of treble damages was in error was inappropriate. Even if the circuit court *had* properly evaluated whether a bona fide dispute existed and whether wages were withheld unreasonably and in bad faith, treble damages would be inappropriate because Hewitt failed to present sufficient evidence to support an award of treble damages.

South Carolina courts have repeatedly recognized that treble damages are not automatic in a wage payment case. *See Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 675 S.E.2d 414 (2009). Rather, as the Court of Appeals recently held, "Section 41-10-80(C) grants the trial court the discretion to award treble damages *if it finds there was no bona fide dispute the wages were owed and the withholding was unreasonable and done in bad faith.*" *Morin v. Innegrity, LLC*, 819 S.E.2d 131, 139 (2018) (emphasis added) (citing *Rice v. Multimedia, Inc.*, 318 S.C. 95, 98-99, 456 S.E.2d 381, 383 (1995)). This is the standard in South Carolina for awarded treble damages. There is no evidence in the record that the circuit court applied this standard in this case. As the Supreme Court has noted, "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, 98, 456 S.E.2d 381 (1995) (emphasis added).

“A finding that an employee is entitled to recover wages is not equivalent to a finding that there existed no bona fide dispute as to the employee’s entitlement to those wages.” *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 600, 675 S.E.2d 414, 415 (2009) (citing *O’Neal v. Intermedical Hosp. of South Carolina*, 355 S.C. 499, 585 S.E.2d 526 (Ct. App. 2003)). Rather, the trial court *must* determine whether there was a bona fide dispute before imposing treble damages. *Id.* at 600-01, 416. The Court of Appeals recently reiterated this point by holding in *Morin v. Innegrity, LLC*, that a jury finding that wages were owed was not sufficient to justify the imposition of treble damages. As the Court of Appeals noted:

The trial court found the jury’s verdict proved there was no reasonable or good faith dispute. But 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.”

Morin v. Innegrity, LLC, 819 S.E.2d 131, 139 (2018) (citing *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 600, 675 S.E.2d 414, 415 (2009)).

The Court’s ruling does not contain any discussion about whether there was a bona fide dispute as to wages owed or whether Shaw’s Pharmacy acted unreasonably and in bad faith. Rather, the circuit court ruled in summary fashion that Hewitt’s unpaid wages “should be trebled, pursuant to the above-referenced code section.” This is strikingly similar to the circuit court’s ruling in *Temple v. Tec-Fab, Inc.* that back wages “will be trebled as required

by statute...,” which the Supreme Court held was *erroneous*. *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599-600, 675 S.E.2d 414, 415-416 (2009).

Even if the circuit court had properly evaluated whether a bona fide dispute existed, which it did not, treble damages would not be warranted because a bona fide dispute exists and there is no evidence Shaw’s Pharmacy acted unreasonably and in bad faith. At the LLR stage and throughout the instant action, Shaw’s Pharmacy has disputed Hewitt’s entitlement to unpaid wages.² While Shaw’s Pharmacy acknowledged to LLR that it did not always pay Hewitt on time, it has always taken the position that it eventually paid Hewitt everything she was owed. The pleadings and Turner’s affidavit alone clearly establish a genuine issue of material fact on this point.

The only evidence relied upon by the circuit court in awarding treble damages were LLR documents, which were ambiguous and did not suggest any bad faith by Shaw’s Pharmacy and Turner. Rather, they suggest an ongoing dispute about whether Hewitt was entitled to alleged unpaid wages. One of the LLR documents relied upon by the circuit court acknowledged Shaw’s Pharmacy’s claim that it paid Hewitt everything owed to her, stating that Turner told LLR “Once [Hewitt’s paycheck] was cashed [Turner] *would always give it to Ms. Hewitt even though it would not always be on the sched-*

² Shaw’s Pharmacy has also denied Hewitt’s characterization of the arrangement between her and Shaw’s Pharmacy as being a mix of salary and hourly pay, which also represents a bona fide dispute between the parties.

uled pay date.” (Exhibit A to Order Granting Plaintiff’s Motion for Partial Summary Judgment, p. 2) (emphasis added).

Likewise, the “Citation and Notification of Penalty” issued by LLR was ambiguous, stating that Shaw’s Pharmacy was being cited for “fail[ing] to pay wages due to Shadia Hewitt in the approximate amount of \$10,400.00 *by [Hewitt’s] regular pay day(s) of 5/3/2013 thru 7/26/2013.*” (Exhibit A to Order Granting Plaintiff’s Motion for Partial Summary Judgment, p. 1) (emphasis added). This language can readily be interpreted as citing Turner for failing to make payments *on the “regular pay day(s)”* – which he admitted in the LLR proceeding – rather than for failing to make the wage payments at all, which he denies. There simply was not sufficient evidence contained within the LLR documents, nor was there any other evidence presented to the circuit court, to support a finding that Shaw’s Pharmacy acted unreasonably and in bad faith or to suggest there was not a bona fide dispute over unpaid wages.

CONCLUSION

For the foregoing reasons, the Court should reverse the portion of the circuit court’s Order Granting Plaintiff’s Motion for Partial Summary Judgment granting treble damages and/or the circuit court’s denial of the portion of Defendants’ Motion to Reconsider arguing that treble damages were inappropriate. Because Hewitt failed to introduce evidence sufficient to show that no bona fide dispute existed and that Shaw’s Pharmacy acted unreasonably and in bad faith, Shaw’s Pharmacy contends that the circuit court’s order awarding treble damages should be reversed and no treble damages awarded,

consistent with the Court of Appeals' authority to find its own facts. In the alternative, because the circuit court failed even to address whether a bona fide dispute existed and whether Shaw's Pharmacy acted unreasonably and in bad faith, the case should be remanded to the circuit court to make a determination as to whether treble damages are warranted.

Respectfully submitted,



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The Shaw Corporation d/b/a Shaw's Pharmacy and
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of whom The Shaw Corporation d/b/a Shaw's Phar-
macy is the Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant by sending to Respondent's attorney of record a copy of the same via first class mail, properly addressed, postage prepaid to the following address: W. Benjamin McClain, Jr., Esq., 300 E. Washington Street, Suite I, Greenville, SC 29607.

November 19, 2018



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November 19, 2018

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *Shadia Hewitt v. The Shaw Corporation*
Case No. 2018-001603

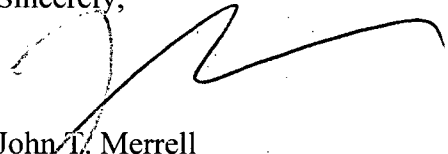
Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of (1) Initial Brief of Appellant and Proof of Service and (2) Appellant's Designation of Matter to be Included in the Record on Appeal and Proof of Service. Please file the original and return the time stamped copy in the self-addressed, stamped envelope provided.

A copy of these filings is being served on Appellee's counsel Ward Benjamin McClain, Jr.

If you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,



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