

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2010-CP-32-3172
APPELLATE CASE NO. 2012-212705

Martha D. Goodwyn,

Respondent,

v.

Shadowstone Media and
Robert Pachaly,

Appellants.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. IS IT ERROR TO AWARD TREBLE DAMAGES WHEN THERE IS A BONA FIDE DISPUTE OVER HOW MUCH, IF ANYTHING, IS OWED? 3
- II. WAS THERE A BONA FIDE DISPUTE REGARDING HOW MUCH, IF ANYTHING, WAS OWED WHEN APPELLANTS BELIEVED SHADOWSTONE HAD OVERPAID GOODWYN AND THE JURY FOUND SIGNIFICANTLY LESS THAN GOODWYN DEMANDED? 4
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- VI. SHOULD THE TRIAL COURT HAVE DECLINED TO AWARD ATTORNEY’S FEES WHEN THE AWARD OF ATTORNEY’S FEES WAS INEQUITABLE? 10

STATEMENT OF THE CASE

On October 2, 2009, Martha Goodwyn brought this case against Shadowstone Media, Inc. (“Shadowstone”), Nyquist Engineering, Inc., and Robert Pachaly (“Pachaly”). Nyquist Engineering, Inc. was dismissed, and the complaint was subsequently amended on November 26, 2011. Goodwyn asserted causes of action against Shadowstone and Pachaly for breach of contract, violation of S.C. Code Ann. § 41-10-10 (1986) *et seq.*, and fraud. The matter was tried to a jury before the Honorable R. Knox McMahon in Lexington, County South Carolina.

On June 5, 2012, the jury found for Goodwyn against both defendants and

awarded \$3,444.00 in damages. Goodwyn moved the court to treble the damages and to award attorney's fees. The Appellants argued against the motion. By order filed June 29, 2012, the court awarded attorneys' fees and trebled the damages. This appeal followed.

FACTS

Pachaly was one of the managers of Shadowstone. (R. p. 80, lines 11-18) Shadowstone hired Goodwyn as a sales agent working on commission. (R. p. 89). She was entitled to a draw against her earnings. (R. p. 89). Shadowstone paid Goodwyn draws totaling \$1,298.44. (R. p. 91). Goodwyn, however, earned only \$404.17 (R. p. 90), because Shadowstone collected only a portion of her sales (R. p. 79, line 24 - p. 80, line 2; R. p. 90) and then went out of business because of inadequate sales. (R. p. 78, lines 13-23)

In her amended complaint, Goodwyn asserted that she was entitled to payment of back wages in the amount of \$5,194, plus commissions of at least \$3,500, plus insurance premiums in the amount of \$1,428.39, for a total of \$10,122.39 (R. p. 8, ¶ 14). In the answer, Appellants pled payment as a complete defense. (R. p. 14, ¶¶ 14, 15).

Goodwyn contended at trial that she was on salary (R. p. 23, lines 6-14), had worked a total of 22 weeks (R. p. 56, lines 20-22), and was entitled to be paid \$5,194.00 in addition to what she had already been paid (R. p. 92), (\$6,600 - \$1,406 paid)), as well as payment of \$3,500 for commissions for ads she sold (R. p. 56, line 23 - p. 57, line 4), and medical insurance premiums of \$1,428.39 (R. p. 59, lines. 2-19; R. p. 89). She denied ever receiving the hiring letter. (R. p. 27, line 24 - p. 28, line 5). Although she says she complained she was not being paid correctly while she was still working (R. p.

42, lines 4-12), she offers no evidence of that complaint. (R. p. 71, lines 5 - 25). It is relevant to both the notice issue and the award of attorney's fees that she was at all times relevant married to her lawyer. (R. p. 69, line 10 – p. 70, line 7).

At trial, Appellants presented evidence that Goodwyn was to be paid on a commission basis. (R. p. 72, lines 1-6; R. p. 82, lines 8-16; R. p. 89). Goodwyn and Pachaly talked about a fixed amount per week but there was no agreement on that. (R. p. 72, lines 14-19; R. p. 43, lines 3-9 and lines 20-22; R. p. 76, line 17 – p. 77, line 3). While Goodwyn sold some ads, Shadowstone never collected on most of the price (R. p. 90). Shadowstone actually overpaid Goodwyn by \$894.27 (R. pp. 90 - 91). Shadowstone did not reply to the demand letter (R. p. 92) because it was preposterous. (R. p. 79, line 20 – p. 80, line 2). Shadowstone did not seek reimbursement. (R. p. 12 - 15). The fraud issue was not tried. The jury found damages for violation of the Payment of Wages Act totaling \$3,444.00, but awarded nothing for breach of contract. (R. p. 2 - 5). Goodwyn's attorney filed an affidavit of attorney's fees. (R. p. 93-95). That affidavit does not say that Goodwyn ever paid those fees.

ARGUMENTS

I. IT IS ERROR TO AWARD TREBLE DAMAGES WHEN THERE IS A BONA FIDE DISPUTE OVER HOW MUCH, IF ANYTHING, IS OWED.

Under S.C. Code Ann. § 41-10-80(C)(2011), the plaintiff in a payment of wages case who is awarded her unpaid wages may recover treble damages and attorney's fees. The award of treble damages and attorney's fees is in the sound discretion of the trial court. O'Neal v. Intermedical Hospital of South Carolina, 355 S.C. 499, 508, 585 S.E.2d

529, 531 (Ct.App. 2003).

If there is a bona fide dispute over how much, if anything, is owed to the plaintiff, then it is error for the trial court to treble the damages. Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995). The Rice court, in interpreting the statute, stated:

Section 41-10-80(C) of the Wage Payment Act states:

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. Any civil action for the recovery of wages must be commenced within three years after the wages become due. [Emphasis supplied]. . . .

Thus, by using “may”, rather than “shall”, the legislature has provided that the penalty is discretionary with the judge. This interpretation accords with the purpose of the Wage Payment Act, to wit: to protect employees from the unjustified and wilful (sic) retention of wages by the employer. The imposition of treble damages in those cases where there is a bona fide dispute would be unjust and harsh.

Rice at 98, 383. *Accord*, Temple v. TEC-FAB, Inc., 381 S.C. 597, 600, 675 S.E.2d 414, 416 (2009); Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 612, 518 S.E.2d 591, 598 (1999).

II. BECAUSE APPELLANTS BELIEVED SHADOWSTONE OVERPAID GOODWYN AND THE JURY FOUND SIGNIFICANTLY LESS THAN GOODWYN DEMANDED, THERE WAS A BONA FIDE DISPUTE REGARDING HOW MUCH, IF ANYTHING, GOODWYN WAS OWED

In O’Neal v. Intermedical Hospital of South Carolina, 355 S.C. 499, 585 S.E.2d 529 (Ct.App. 2003), O’Neal claimed she was owed \$681.61 in back wages and \$2,541.39 in accrued time off. The hospital did not dispute the accrued hours, but argued that O’Neal was terminated for cause and, under Intermedical’s policy, she was not entitled to payment for the accrued time off. The Jury found for O’Neal in the amount of \$1,350 for accrued wages, but for Intermedical for back wages. The trial court found that, because

the jury awarded some damages to O'Neal, the jury

therefore determined [Intermedical] did not terminate [O'Neal] for cause and thus no good faith basis for refusal to pay benefits was established. Accordingly, the Court hereby trebles the jury verdict to \$4,050.00.

Id. at 509, 531.

Intermedical appealed. The O'Neal court held that

The jury's verdict in favor of O'Neal does not lend itself to the interpretation espoused by the trial court. As evidenced by the decisions in Futch and Rice, 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. Further, Intermedical did not dispute the number of time off hours O'Neal had accrued at the time she was terminated. Nevertheless, the jury awarded her damages equal to payment of only a portion of those hours, indicating the jury determined that Intermedical properly withheld payment for the remaining portion of accrued hours. (emphasis added.)

Id. at 509, 532.

Here, Goodwyn claimed to be entitled to \$5,194.00 in wages, and an additional \$3,500 in commissions, for a total of \$8,694.00. (After resting, Goodwyn dropped the claim for insurance premiums.)(R. p. 81, lines 4-7). Appellants did not dispute the ads she sold, just as Intermedical did not dispute the hours O'Neal accrued. Appellants disputed her entitlement to payment for those sales because Shadowstone never collected on most of the sale, just as Intermedical disputed O'Neal's entitlement to payment for the accrued hours. Of the \$8,694 she demanded, the jury awarded \$3,444. The jury award here, like the award in O'Neal, indicates that the "jury determined that [Appellants] properly withheld payment" because a bona fide dispute existed over payment of Goodwyn's claimed wages. Plaintiff's Trial Exhibit 4 (R. p. 80) shows that Goodwyn earned only \$404.17, while Plaintiff's Trial Exhibit 11 (R. p. 92) shows she was paid

\$1,406.00.

III. BECAUSE THERE WAS A BONA FIDE DISPUTE OVER HOW MUCH, IF ANYTHING, GOODWYN WAS OWED, THE TRIAL COURT SHOULD NOT HAVE TREBLED DAMAGES.

The O'Neal jury awarded her \$1,350 instead of \$2,541.44 on back wages, and nothing instead of \$681.61 on the back pay, or just over 40% of the total claim pursued at trial. The trial court nevertheless found that there was not a bona fide dispute and awarded treble damages and attorney's fees. In discussing that finding, the O'Neal court held that

The jury's finding in this regard belies the trial court's determination that, based on the award of damages, the jury necessarily determined that Intermedical failed to establish a good faith basis for refusal to pay the wages at the time of O'Neal's discharge from employment. Therefore, to the extent the trial court found the jury's verdict was equivalent to a finding that no bona fide dispute existed, such finding was erroneous.

Id. at 509, 532.

In Rice, Multimedia believed it did not owe Rice anything because of a departure policy that Multimedia believed applied to all its subsidiaries. The jury determined that Rice was entitled to payment on some of his claims but not on all of them. Id. at 96-7, 382. The Rice court held that the trial court was correct in not awarding treble damages. Id. at 99-100, 384.

Here, the jury awarded less than 35% of the amount Goodwyn sued for, and only 40% of the amount she pursued at trial. There was a dispute over whether Goodwyn was hired at a salary as she claims or only commission as Appellants claim. The jury apparently decided there was a bona fide dispute over the terms, and settled the matter

based upon its judgment. Significantly, it did not award Goodwyn even half of what she asked for, indicating the jury's recognition of a bona fide dispute. Trebling damages in such a case is an error at law, and should be reversed.

IV. THE APPELLATE COURT CAN TAKE ITS OWN VIEW OF THE FACTS AND SHOULD FIND THAT A BONA FIDE DISPUTE EXISTED.

The granting of treble damages is an action in equity. O'Neal at 510, 532. In an action in equity, "the South Carolina Constitution mandates that the appellate court take its own view of the facts." Id. at 510, 532. While the facts are disputed, the written evidence shows that Goodwyn was hired on a commission basis, that she earned only a little over \$400 in commissions, and she received draws against her commissions of a little less than \$1,300 and was therefore overpaid. While Goodwyn denies ever having received the hiring letter, she has only her testimony that she was entitled to wages of \$300 per week. She never gave any written notice to Appellants that she was not being paid in accordance with her version of her employment agreement in all the 22 weeks she worked, even though she was married to her attorney.

Goodwyn cannot explain why she did not give written notice to Appellants when she was not paid in accordance with her version of the hiring agreement, nor can she explain why she did not receive the hiring letter. Pachaly was not sure if he handed it to her and mailed it to her or just handed it to her, but he was sure he did one or both. (R. p 74, line 11 – p. 75, line 20).

The trial court cited Pachaly's uncertain testimony regarding the delivery of the hiring letter and concluded that it "would not constitute a bone fide (sic) good faith defense to the failure to pay wages under the facts of this case." (R. p. 3). However, this

conclusion is not borne out by the fact that the jury awarded zero for the breach of contract cause of action and less than 40% under the failure to pay wages cause. (R. p. 2).

Apparently the jury found that Goodwyn was not entitled to the payments she claimed, which necessarily implies that the “jury determined that [Appellants] properly withheld payment.”

While “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” (O’Neal at 509, 532), the converse is not true. If the jury determines that the employee is not entitled to substantially what she claims, then logically the jury has determined that there is a bona fide dispute over how much she is owed, or at the least that the employer “properly withheld payment.”

The jury concluded that Goodwyn was entitled to some payment, but that she was not entitled to anything for breach of contract and only a portion of her claim for failure to pay wages. The facts of this case, as in the O’Neal case, show that there was a bona fide dispute over whether Goodwyn was entitled to further payment, and if so, how much.

The trial court discussed the hiring letter but dismissed it, stating that “the Court does not know what weigh (sic) or value the jury gave the ‘hiring letter’, if any, but concludes that this would not constitute a bone fide (sic) good faith defense to the failure to pay wages under the facts of this case.” The hiring letter shows that Goodwyn was hired under a commission only arrangement, with draws against her commissions. In relevant part, the letter says

Your compensation is based on commissions earned from the accounts which you sell into one or more of the Card Books. The standard commission is \$1,000 for each full rate ad in each book. In the event that

an ad rate is discounted then the commissions are reduced accordingly. . . Commissions are paid upon collection by the company of the ad costs from the accounts. . . As you are aware most of the accounts will be paying monthly over a 12 month period. As a result each month you will receive one twelfth of the total commission for the insertion of each month upon collection of that month's bill from the advertiser.

(R. p. 89)

Accordingly, if the letter accurately reflects the hiring arrangement, then Goodwyn's claim for wages is defeated, and her claim can only advance on a theory of commissions. Therefore, the hiring letter would constitute an absolute bona fide basis for a good faith dispute over how much Goodwyn was owed. The trial court ignored this effect, but apparently the jury did not.

After holding that the letter would not constitute a bona fide good faith defense, the trial court stated that "this Court finds that there was not a sufficiently close question of law or fact that would discourage the award of additional damages. Furthermore, the Court finds that additional damages are necessary to serve the substantial interest of the state in protecting employees." It was error for the trial court to turn the test on its head. The test is whether there was a bona fide dispute, not whether there was a "sufficiently close question to discourage an award of additional damages." The trial court apparently focused on "the substantial interest of the state in protecting employees" instead of on whether there was a bona fide dispute. The trial court did not consider the great disparity between what Goodwyn claimed and what the jury determined she was owed in concluding that there was no bona fide good faith dispute. Because there was a bona fide dispute, there was a close enough question. Rice, O'Neal, Futch.

V. THE TRIAL COURT SHOULD NOT HAVE AWARDED ATTORNEY'S FEES BECAUSE THERE WAS A BONA FIDE DISPUTE.

The teaching of Rice, Futch, and O'Neal is that attorney's fees are not recoverable in a failure to pay wages action if there is a bona fide dispute.

In O'Neal, the court held that an award of attorney's fees was improper when there was a bona fide dispute over the payment of wages, stating that "[w]e agree with Intermedical that there was a bona fide dispute as to whether Intermedical owed O'Neal any wages such that the imposition of the award of attorney's fees was also improper pursuant to" Futch and Rice. Id. at 510-11, 532. Because the jury determined that Shadowstone did not owe Goodwyn anything like what she demanded and that Shadowstone did not breach the contract, because the documents show that Goodwyn was overpaid under the contract, and because there was no salary, it follows that Shadowstone had a bona fide reason for believing that it did not owe Goodwyn any further money.

VI. THE TRIAL COURT SHOULD NOT HAVE AWARDED ATTORNEY'S FEES BECAUSE THE AWARD OF ATTORNEY'S FEES WAS INEQUITABLE.

The trial court recited the correct elements for consideration of attorney's fees. If attorney's fees are awarded, the amount is governed by the considerations of the factors set forth in the Order; "(1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar legal services; (6) the beneficial results obtained. A court should consider the actual likelihood that a party will have to pay those fees." (Order P. 1)

As the trial court correctly recited, it is inequitable for the court to award

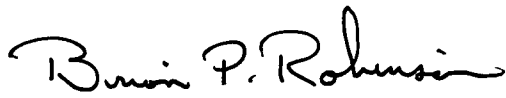
attorney's fees if the party will never pay those fees. (R. p. 2; Calhoun v. Calhoun, 339 S.C. 96, 529 S.E.2d 14 (2000). Goodwyn's attorney is her husband, and has been since before she was employed by Shadowstone. It is highly unlikely that Goodwyn will ever pay attorney's fees to her husband. Goodwyn's attorney's fee affidavit recites the hours incurred and the value he attached to those hours, but significantly never says that his wife ever paid those fees, or any part of them. It would be inequitable for the Appellants to pay Goodwyn fees that she is otherwise never likely to pay. In other words, she is being paid for costs she would not otherwise incur. Additionally, she was awarded only 35% of what she sued for. Under (6) above, the Appellants had a more beneficial result than Goodwyn.

CONCLUSION

Because there was bona fide dispute over whether Shadowstone owed Goodwyn anything, this Court should reverse the judgment of the circuit court in trebling the damages and awarding attorney's fees.

Respectfully submitted,

April 18, 2013.



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CERTIFICATE

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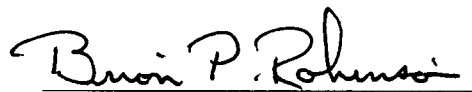
Shadowstone Media, Inc. and
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APPELLANTS' BRIEF CERTIFICATION

I certify that the Appellants' Brief conforms to the requirements of Rule 211(b) of the Appellate Court Rules.

April 18, 2013



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