

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2014-002574

Joseph Anthony Gelotte,

Respondent,

v.

Davis Roofing and Maintenance, LLC,
and Jerry Davis,

Appellants.

FINAL BRIEF OF RESPONDENT

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FACTS

Appellant, Jerry E. Davis ("Appellant"), is the sole owner of a roofing business operating as Davis Roofing and Maintenance, LLC ("Davis Roofing").¹ In early March 2011, Respondent, Joseph Gelotte ("Respondent") began working for Appellant as a salesman for Davis Roofing. In an email dated March 5, 2011, the employment terms were memorialized and provide as follows:

- Respondent receives a commission of 20% of the net profit for each job he sells.
- Appellant pays Respondent \$1,500.00 each week as an advance on commissions.
- Appellant pays Respondent the remainder of commissions owed once per month (between the first and tenth of each month).
- Appellant provides Respondent with a vehicle (and associated expenses), office supplies, and equipment needed.

R. p. 69. While Appellant regularly paid the \$1,500.00 weekly advance on commissions, he refused to pay the balance of those commissions. Supp. R. p. 2. In late June or early July 2011, Respondent returned his company vehicle to Appellant and left to work for another roofing company. Supp. R. p. 2; R. p. 36.

Respondent produced spreadsheets detailing the calculations, costs, profits and commissions owed for each of the forty-seven jobs he sold which were completed, as well as the additional twelve jobs he sold that were not completed as of the day he stopped working for Appellant. R. pp. 72-81. These spreadsheets were received into evidence without objection, and show Respondent is owed \$32,010.68 in commissions. Respondent also submitted, without objection, a payment sheet detailing thirteen cash payments and one check payment he received from Appellant totaling \$20,280.00. R. pp. 70-71. Respondent acknowledged that another check

¹ Davis Roofing was also a named defendant and is an appellant in this action along with Jerry E. Davis.

dated June 29, 2011, in the amount of \$1,000.00, also constituted a payment to him - mistakenly, this figure was not included among the payments listed on Plaintiff's Exhibit 2. Respondent agrees this oversight is an error (the trial judge awarded treble damages based upon a balance of \$11,730.68), and concedes he was actually paid \$21,280.00 of the \$32,010.68 total, leaving a corrected balance of \$10,730.68.

Appellant did not appear at the trial of this non-jury matter, and no other testimony or witnesses were offered to dispute Respondent's explanation of the employment terms and the unpaid commissions.

ARGUMENT

I. A FINDING THAT APPELLANT FAILED TO PAY THE BALANCE OF COMMISSIONS OWED TO RESPONDENT IS SUPPORTED BY THE UNDISPUTED EVIDENCE.

"[A]ctions for violation of the Payment of Wages Act are actions at law." Mathis v. Brown & Brown of S. Carolina, Inc., 389 S.C. 299, 307, 698 S.E.2d 773, 777 (2010) (citing McCall v. IKON, 380 S.C. 649, 657, 670 S.E.2d 695, 700 (2008); Ross v. Ligand Pharmaceuticals, Inc., 371 S.C. 464, 468, 639 S.E.2d 460, 462 (Ct.App.2006)). "In an action at law tried without a jury, the trial judge's findings have the force and effect of a jury verdict upon the issues and are conclusive on appeal when supported by competent evidence." Id. (citing Beheler v. Nat'l Grange Mut. Ins. Co., 252 S.C. 530, 535, 167 S.E.2d 436, 438 (1969)). "Accordingly, [the appellate court's] scope of review is limited to determining whether the findings are supported by competent evidence and correcting errors of law." Id. (citing Temple v. Tec-Fab, Inc., 381 S.C. 597, 600, 675 S.E.2d 414, 415 (2009)).

This was a bench trial, and the corrected award of \$10,730.68 award is supported by Respondent's testimony, an email from Defendant to Plaintiff establishing the terms of the

employment and compensation, spreadsheets which show jobs worked and commissions owed, a tally of payments received (in cash/check), and an accounting of the total that was never paid. (R. pp. 41, 43, 46-47, 53-54; 69-82). In this instance, the only witness to testify was Respondent, and each of Respondent's exhibits were submitted without objection. All of this evidence conclusively establishes Respondent is owed a corrected balance of \$10,730.68 on the commissions he earned.

Appellants argue two additional checks (one dated April 22, 2011, in the amount of \$7,500.00, the other dated May 13, 2011, in the amount of \$6,300.00) were paid to Respondent by Appellant. R. pp. 116-117. While Respondent readily confirmed he endorsed these two checks, he explained these checks were only meant to document money that had already been paid to him in cash – Respondent never actually cashed or deposited these checks. R. pp. 42, 60. Respondent testified it was his understanding Defendant wanted to issue these checks memorializing past payments for bookkeeping purposes. R. pp. 42, 59. Regarding the stamps on the back of the checks indicating they had perhaps been cashed, Respondent explained he has never maintained an account with BB&T (the bank shown on the stamps), nor has he ever cashed a check at "Ruchi Food Mart" (the entity shown on the stamps as possessing the account for deposit with BB&T). R. p. 65. As such, the undisputed evidence shows these checks did not constitute additional payments to Respondent.

Appellant's argument regarding Respondent's income tax return is a red-herring. Appellant asserts Respondent claimed "the \$7,500.00 check and the \$6,300.00 check on his 2011 tax return." Appellant's Initial Brief, p. 7. However, while the total of these two checks was reported as part of the income Respondent received on his 2011 tax return, this was paid to him in cash. Again, as detailed above, these checks were not cashed such that Respondent had an

additional \$13,800.00 of unreported income. There are no entries or other notations on Respondent's tax return indicating the aforementioned checks specifically were cashed by him or that he received additional income from these specific checks. R. p. 113. As such, there is no "binding admission" on his tax return as suggested by Appellant. Ultimately, Respondent's 2011 income tax return has no bearing on this issue.

II. TREBLE DAMAGES ARE APPROPRIATE AS THERE IS NO EVIDENCE OF A BONA FIDE DISPUTE REGARDING THE WAGES OWED TO REPSONDENT.

Section 41-10-80 of the Payment of Wage Act provides:

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.

S.C. Code Ann. § 40-10-80(C). "As our courts have stated: 'If there is a dispute over unpaid wages **the employer acts at his peril** and the court in its discretion may award treble damages when the withholding was unreasonable and there was no good faith wage dispute,' and that '**the legislature intended to punish the employer who forces the employee to resort to the court** in an unreasonable or bad faith wage dispute.'" Ross, 371 S.C. at 472, 639 S.E.2d at 465 (quoting Rice v. Multimedia, Inc., 318 S.C. 95, 99, 456 S.E.2d 381, 383 (1995)) (emphasis added).

A bona fide dispute exists when the employer and employee disagree "as to whether and to what extent payment is due," often evidenced by "conflicting testimony." O'Neal v. Intermedical Hospital of S.C., 355 S.C. 499, 508-510, 585 S.E.2d 526, 531-532 (Ct.App.2003). In considering these matters, the court views the facts as of the date at which the employer allegedly violated the Payment of Wages Act by failing to pay the wages. See Mathis, 389 S.C.

at 315-316, 698 S.E.2d at 781-782 (finding that the relevant date for determining whether the employer reasonabl[y] withheld wages is the time at which the wages were withheld, i.e., when the employer allegedly violated the Act").

Respondent provided a detailed account, by using the payment methodology to which the parties agreed, regarding the additional payments he was owed by Appellant. R. pp. 35, 37-41, 43-47, 51-52; Supp. R. p. 2). Respondent's undisputed testimony confirms there was no question Appellant owed him these commissions:

Q: When you asked [Appellant] about settling up with you on the commissions you were owed, did he ever deny that he owed it to you?

A: No, sir.

R. p. 52. Additionally, the undisputed evidence establishes that issuing the two checks dated April 22, 2011, and May 13, 2011, was done specifically at Appellant's request to memorialize past cash payments.² Because Appellant failed to even appear, there is no conflicting testimony, nor is there other contrary evidence in the record to consider. Therefore, there is no evidence in this instance demonstrating a bona fide dispute as to the wages owed to Respondent, and the award of treble damages is appropriate.

² Respondent testified:

"It was one time in our office in Greenville where [Appellant] had paid me for a while. [Appellant] had told me that I needed to catch his books up. It was a check for 7500. Just for me to sign it and then turn and give it back over to him. But [Appellant] had already paid me that money in \$1500 draws coming up to that point. There was another time, it was at a restaurant, for 6000. The same thing happened there."

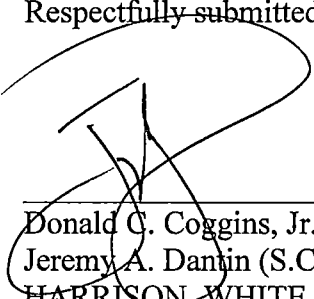
R. pp. 42-43.

CONCLUSION

The present controversy being presented to this Court is not complicated. Respondent was not paid the full amount of commissions he was owed, leaving an unpaid balance of \$10,730.68. The primary argument Appellant now presses to this Court is nothing more than an invitation to ignore the actual evidence and speculate as to the nature of two checks Appellant now suggests were additional payments (which would actually constitute an *overpayment*). It seems Appellant would have this Court believe Respondent abruptly left Davis Roofing because he was upset that he was paid too much. Of course, Appellant did not bother to come to court the day of the trial, and the undisputed evidence clearly establishes Appellant knowingly refused to pay the commissions owed to Respondent. The trebling of damages gives effect to the legislature's intent to punish such acts by employers as those committed by Appellant in this instance, and the corrected award of \$32,192.04 should be affirmed.

Respectfully submitted,

April 7, 2015



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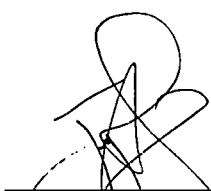
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CERTIFICATE OF COUNSEL

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

April 7, 2015



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