

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Perry H. Gravely, Circuit Court Judge

Case No.: 2019-001038

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JUL 26 2019

SC Court of Appeals

Reggie ("Reg") Wells.....Appellant.

vs.

Vetech, LLC; Vetech Group; Fastube; Process Development Corporation; and
James R. Pongracz, individually.....Respondents.

APPELLANT'S INITIAL BRIEF



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July 24, 2019

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FAILING TO APPLY THE PROPER LEGAL STANDARD TO DETERMINE THE EXISTENCE OF A BONA FIDE DISPUTE WHEN THE RECORD REFLECTED THE EMPLOYER CONFESSED JUDGMENT TO THE ENTIRETY OF PLAINTIFF'S DUE AND OWED WAGES?
2. DID THE TRIAL COURT ERR IN FINDING WELLS' ACCEPTANCE OF AN OFFER OF JUDGMENT DID NOT ENTITLE HIM TO TREBLE DAMAGES AND ATTORNEYS' FEES AND COSTS UNDER S.C. CODE 41-10-80(C)?

STATEMENT OF THE CASE

On March 21, 2018 this action was commenced by Plaintiff, a former employee of the Defendants, to recover unpaid wages and reimbursement of business expenses and costs, along with treble damages and reasonable attorney's fees and costs. On September 6, 2018, Defendants filed an Answer with a general denial and boiler plate rendition of other defenses. On October 11, 2018 Counsel for Defendants, pursuant to SCRCP Rule 68, served upon Plaintiff's Counsel an offer of judgment in the total amount of \$5,968.89. On October 31, 2018, Plaintiff's Counsel filed an acceptance of the offer of judgment and simultaneously filed a verified motion for Court Approval/Order for attorney fees and costs and award of treble damages. A hearing was held on May 20, 2019. The Court then filed a Form Four on May 21, 2019 setting forth:

“This matter came before the Court on May 20, 2019 upon Plaintiff's Motion for Attorneys Fees and Treble Damages. The Plaintiff accepted an Offer of Judgment filed by the Defendant and sought attorney's fees and treble damages under S.C. Code Section 41-10-80, but there was no record from which to determine whether attorney's fees and treble damages were appropriate under this statute. Therefore, Plaintiff's Motion is denied.”

This Notice of Appeal, along with proof thereof, was filed with the Court and served on counsel for the Defendants on June 19, 2019.

STANDARD OF REVIEW

Actions for violation of the Payment of Wages Act are actions at law. *See 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. See Beheler v. Nat'l Grange Mut. Ins. Co., 252 S.C. 530, 535, 167 S.E.2d 436, 438 (1969). Accordingly, this Court's scope of review is limited to determining whether the findings are supported by competent evidence and correcting errors of law. See Temple v. Tec-Fab, Inc., 381 S.C. 597, 600, 675 S.E.2d 414, 415 (2009).

FACTS

This lawsuit was filed by Plaintiff's Counsel on March 21, 2018. Defendants' Offer of Judgment pays every penny of owed wages to Plaintiff Wells. Before filing suit, Wells sought, on his own from his former employer, payment of the exact amount (\$5,968.89) (Defendants' offer of judgment of October 11, 2018) (See Exhibit 2 of Plaintiff's motion for attorney fees/treble damages) This total amount of \$5,968.89 is comprised of \$3,252.29 in owed reimbursement of expenses and \$2,716.60 in due and owed wages.

ARGUMENTS

- I. DID THE TRIAL COURT ERR IN FAILING TO APPLY THE PROPER LEGAL STANDARD TO DETERMINE THE EXISTENCE OF A BONA FIDE DISPUTE WHEN THE RECORD REFLECTED THE EMPLOYER CONFESSED JUDGMENT TO THE ENTIRETY OF PLAINTIFF'S DUE AND OWED WAGES?

The Payment of Wages Act provides that when an employer fails to pay wages, an employee may recover "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." § 41-10-80(C). 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. Rice v. Multimedia, Inc., 318 S.C. 95, 98-99, 456 S.E.2d 381, 383 (1995). Therefore, the trial court must determine whether "a bona fide dispute" exists as to an employee's entitlement to wages before awarding treble damages or attorney's fees. Temple v. Tec-Fab, Inc., 381 S.C. 597, 600-01, 675 S.E.2d 414, 415-16 (2009). When reviewing such an award, "this court can take its own view of the facts." Ross v. Ligand Pharm., Inc., 371 S.C. 464, 471, 639 S.E.2d 460, 464 (Ct. App. 2006); see also O'Neal v. Intermedical Hosp. of S.C., 355 S.C. 499, 509-511, 585 S.E.2d 526, 532 (Ct. App. 2003) (reversing an award of treble damages because, based on the court's review of the record, "a bona fide dispute existed as to whether and to what extent [the employee] was entitled to payment".. "[T]he relevant date for determining whether the employer reasonably withheld wages is the time at which the wages were withheld" Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 316, 698 S.E.2d 773, 782 (2010)... i.e., when the employer allegedly violated the Act. See Rice, 318 S.C. at 99, 456 S.E.2d at 383 (in enacting the Payment of Wages Act, "the legislature intended to punish the employer who forces the employee to resort to the court in an unreasonable or bad faith wage dispute."). See Mathis at 773.

The question before the Court is whether at the time that Respondent failed to pay Wells' due and owed wage compensation, in June of 2017, the date of separation of employment, (See Exhibit 2 of Plaintiff's motion for attorney fees/treble damages) it had a reasonably good faith reason for doing so.

"Any and all offers of judgment and any acceptance of offers of judgment must be included by the clerk in the record of the case." See S.C. Code 15-35-400. The failure to acknowledge the Offer of Judgment and its acceptance as evidence in the record is an error. However, going further into the trial court's impermissible burden shifting, it is error to not

award treble damages and reasonable attorney's fees and costs when the record is deficient of the existence of a bona fide dispute. The Respondent, in the entirety of the record, has provided no evidence that it had a reasonably good faith reason for withholding Wells' wages at the time they became due and owed. On the other hand, the record demonstrates Wells has provided proof; he sought the amount due and owed on his own from his former employer prior to instituting the lawsuit. Wells sought in 2017 payment of the exact amount (\$5,968.89) set forth in the Offer of Judgment. This total amount is comprised of \$3,252.29 in owed expenses as well as \$2,716.60 in due and owed wages. (See Exhibit 2 of Plaintiff's motion for attorney fees/treble damages)

The lawsuit was filed by Plaintiff's Counsel on March 21, 2018 out of Defendants' bad faith failure to pay wages and monies it owed to Wells. Defendant's Offer of Judgment pays every penny of the due and owed wages and the expenses Plaintiff Wells sought some six months prior to this lawsuit being filed. If the legal standard as set forth in our state is to not order treble damages and reasonable attorney fees and costs, the trial court must find the Defendant employer has produced a bona fide dispute as to whether the wages were due and owed. Therefore, the failure of the existence of evidence of a bona fide dispute must then also serve as the conclusive standard the court uses to award treble damages and reasonable attorney fees and costs under 41-10-80(C).

II. DID THE TRIAL COURT ERR IN FINDING WELLS' ACCEPTANCE OF AN OFFER OF JUDGMENT DID NOT ENTITLE HIM TO TREBLE DAMAGES AND ATTORNEYS' FEES AND COSTS UNDER S.C. CODE 41-10-80(C)?

The South Carolina Supreme Court addressed this issue in Hueble v. Dept. of Natural Resources, 785 S.E.2d 441 (2016). In that case, the Supreme Court held that Hueble's acceptance of an offer of judgment under the South Carolina Rules of Civil Procedure entitled

him to collect attorneys' fees. Essentially, Hueble prevailed on his § 1983 claim, and therefore qualifies as a prevailing party pursuant to § 1988 because he obtained an enforceable judgment. An important take away from *Hueble* is the weight of the collateral effect the Court gave to the acceptance of the offer of judgment. While the Payment of Wages Act doesn't have a "prevailing party" triggering of award of attorney fees and costs, it does have the requirement the Court determined if a bona fide dispute of the wages existed at the time they are claimed to be due and owed.

Just like in the case at hand, Hueble filed an action in state court and accepted the offer of judgment pursuant to Rule 68, SCRPC.

Rule 68 provides in pertinent part:

- (a) Offer of Judgment. Any party in a civil action . . . may file, no later than twenty days before the trial date, a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor, or to allow judgment to be taken against the offeror for a sum stated therein, or to the effect specified in the offer.

The Supreme Court has previously held that Rule 68 includes costs, but attorneys' fees are not automatically included. *Steinert v. Lanter*, 284 S.C. 65, 66, 325 S.E.2d 532, 533 (1985) (holding a prior statute governing offers of judgment must be strictly construed to allow recovery of costs and not attorneys' fees). So at the very least the trial court erred in not awarding Wells Cost of \$198.73 (See Exhibit 1 of Plaintiff's motion for attorney fees and costs/treble damages) Quoting *Hueble*: "in order to collect attorneys' fees following an offer of judgment, South Carolina courts have required that a specific statute or rule authorize a party to collect attorneys' fees. *Id. Black v. Roche Biomed. Labs.*, 315 S.C. 223, 433 S.E.2d 21 (Ct.App. 1993) (noting that generally costs, fees, and disbursements are allowed when judgment is entered if they are provided for under specific statute or rule)". The Payment of Wages Act provides that when an employer fails

to pay wages, an employee may recover "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." § 41-10-80(C). Therefore, the Payment of Wages statute would be one said statute that qualifies.

In addition, the Supreme Court further found in *Hueble* the offer of judgment included his § 1983 claim. The Court held:

The offer did not distinguish causes of action, and because it resolved the entirety of Hueble's case, we interpret it to address all the claims involved – including the § 1983 action. See *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010) (finding if the language of a contract creates an ambiguity, a court will construe any doubt and ambiguity against the drafter); *Hennessy v. Daniels Law Office*, 270 F.3d 551, 553 (8th Cir. 2001) (explaining an offer of judgment is generally treated as an offer to make a contract).

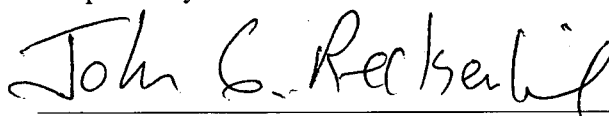
This is identical to our case at hand. The Respondents' offer of judgment to Wells did not distinguish causes of actions. In fact, it was "for all claims alleged in the above-captioned action". All due and owed wages were confessed and to be paid via offer of judgment. Therefore, the acceptance of the offer of judgment serves as proof as to what the Respondent employer is to pay to Wells. However, that does not end the analysis. Instead of the "prevailing party" collateral effect that the Rule 68 offer of judgment had in *Hueble*, the collateral effect Rule 68, under the Payment of Wages Act, evidences the Employer's lack of good faith bona fide dispute if the confession of judgment pays in full all of the due and owed wages. This would mirror the *Goodwyn* bona fide dispute analysis (finding the jury only awarded partially what Goodwyn claimed she was entitled.) See *Goodwyn v. Shadowstone Media*, 757 SE 2d 560. Then the Payment of Wages Act requires the trial court to view the entire record and determine if the Defendant employer has produced a bona fide good faith reason, at the time the wages became due and owed as to why the wages were not paid. The collateral effect of the amount of the Rule

68 confession of judgment is evidence in the record that the trial court in this case failed to consider as no good faith reason the Respondent withheld Wells' due and owed wages at the time he was separated from his employment in 2017.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court, as to imagine the consequences if this ruling stands; whereby employers don't pay employees their due and owed wages, make the employee file a lawsuit, give no reasons as to why employer withheld, and then employer files a confession of judgment some year and months after wages are due and owed and suffer no consequences. Appellant requests this Court find no bona fide dispute exists, and Wells is entitled to treble damages along with a remand to the trial court for a determination of a reasonable amount of attorney's fees and costs.

Respectfully Submitted:



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July 24, 2019

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SC Court of Appeals

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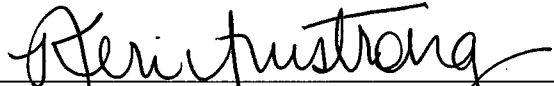
CERTIFICATE OF SERVICE

I, Keri Armstrong, the undersigned paralegal to John G. Reckenbeil, certify that I have mailed the herein below listed pleadings to persons in this matter, postage prepaid, on this 24th day of July 2019, as follows:

PLEADINGS: **Appellant's Initial Brief**
 Designation of Matter of Record on Appeal
 Certification of Designation of Record on Appeal

PERSONS SERVED: **The Honorable Jenny A. Kitchings**
 Clerk of Court
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SC Court of Appeals

**RE: Reggie "Reg" Wells v. Vetech, LLC; Vetech Group; Fastube; Process Development Corporation and James Pongracz, individually
Case No.: 2019-001038**

Dear Ms. Kitchings:

You will find enclosed the original Appellant's Initial Brief in regards to the above referenced case along with a Certificate of Service for the same.

By copy of this letter I am hereby serving counsel of record of the same. Should you have any questions or concerns, please feel free to contact my office.

Yours very truly,


John G. Reckenbeil

JGR/kea

Enclosure

CC: Hannah Rogers Metcalfe
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