

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No.: 2019-001038

Reggie ("Reg") Wells

Appellant,

v.

Vetech, LLC, Vetech Group, Fasttube, Process Development Corporation, and
James R. Pongracz, individually

Respondents.

INITIAL BRIEF OF RESPONDENT

Hannah Rogers Metcalfe
Metcalfe & Atkinson, LLC
1395 S. Church Street
Greenville, South Carolina 29605
Attorney for Respondents

Other Counsel of Record:
John G. Reckenbeil
Law Office of John Reckenbeil, LLC
Post Office Box 314
Mauldin, SC 29662
Attorney for Appellant

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STATEMENT OF ISSUE ON APPEAL

I. DID THE CIRCUIT COURT ERR IN FINDING THAT APPELLANT'S ACCEPTANCE OF AN OFFER OF JUDGMENT DID NOT ENTITLE APPELLANT TO PENALTIES, INCLUDING TREBLE DAMAGES AND ATTORNEYS' FEES, PURSUANT TO THE SOUTH CAROLINA WAGE PAYMENT ACT?

STATEMENT OF THE CASE

This is an appeal of the circuit court's May 21, 2019 Order denying Appellant's motion for attorney fees and treble damages, in favor of the Respondents.

Appellant Wells instituted this action by filing his Complaint on March 21, 2018, alleging that Respondents violated the South Carolina Wage Payment Act by failing to pay Appellant wages for all hours worked, failing to pay all reimbursements of business expenses and costs, and improperly denying paying all wages that became due and owing. Appellant also asserted a claim for unjust enrichment.

Respondents filed an Answer to Appellant's Complaint on September 6, 2018, denying Appellant's allegations. In defense of Appellant's allegations, Respondents claimed that they acted in good faith and upon a reasonable belief that no wages were owed, without the intent to harm Appellant. Respondents also claimed defenses under the doctrines of satisfaction and accord, waiver, laches, and estoppel, *bona fide* dispute, as well as lack of jurisdiction and failure to mitigate damages. Respondents then filed an Offer of Judgment on October 11, 2018 for a sum certain in the amount of \$5,968.89 and Appellant filed an

Acceptance of Defendants' Offer of Judgment on October 31, 2018. Counsel for Appellant filed a Motion for Attorney's Fees the same day. A hearing was held on Appellant's Motion for Attorney Fees on May 20, 2019.

Having reviewed Respondents' Offer of Judgment, read all submissions from the parties, and heard extensive argument from all counsel at the hearing on May 20, 2019, the circuit court entered a Form 4 Order on May 21, 2019, denying Appellant's Motion for Attorney's Fees. The order specifically stated:

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 attorneys fees and treble damages under S.C. Code Section 41-10-80, but there was no record from which to determine whether attorneys fees and treble damages were appropriate under this statute. Therefore, Plaintiff's motion is denied.

Appellant filed a Notice of Appeal on June 20, 2019.

STANDARD OF REVIEW

To the extent Wells's argument raises a legal question with regard to the statutory interpretation of the South Carolina Wage Payment Act, the circuit court's decision is reviewed *de novo*. See *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010) (holding questions of statutory interpretation are questions of law which are subject to *de novo* review and which the Court is free to decide without any deference to the court below); see also *Hueble v. Dep't. of Nat. Resources*, 416 S.C. 220, 785 S.E.2d 461 (2016) (reviewing the issue of prevailing party status for the award of fees under §1988 *de novo* because it raised a legal question). When reviewing the trial court's decision regarding the award of treble damages, a reviewing court can take its

own view of the facts. *O'Neal v. Intermedical Hosp. of S.C.*, 355 S.C. 499, 509-10, 585 S.E.2d 526, 532 (Ct. App. 2003).

A trial court's decision to award or deny attorneys' fees is reviewed for an abuse of discretion. *Heath v. City of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009). The specific amount of attorneys' fees award pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion or an error of law. *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008).

ARGUMENT

Wells contends that his acceptance of Respondents' offer of judgment under the South Carolina Rules of Civil Procedure entitles him to collect treble damages and attorneys' fees. Essentially, he contends that he is entitled to treble damages and attorneys' fees pursuant to the South Carolina Wage Payment Act because he obtained an enforceable judgment.

Respondents extended an offer of judgment in the amount of \$5,968.89 on October 11, 2018. Wells accepted the offer of judgment on October 31, 2018 pursuant to Rule 68, SCRCP. Therefore, South Carolina's procedural rules apply. 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.

S.C.R.C.P. 68(a).

After accepting the offer of judgment, Wells filed a verified motion for approval and for an award of attorneys' fees and costs as well as an award of treble damages. The circuit court denied Wells's motion, stating that "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 appeal followed.

Wells now contends that the circuit court erred and that his acceptance of the offer of judgment entitles him to treble damages and attorneys' fees. Wells is incorrect and the circuit court's decision should be affirmed. Respondent will address Wells's claim for treble damages and attorneys' fees in turn.

A. Treble Damages

Section 41-10-80(c) of the Wage Payment 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.

S.C. Code Ann. § 41-10-80(c) (Supp. 1993) (emphasis added).

The treble damages provision of Section 41-10-80(c) is not mandatory. *Rice v. Multimedia, Inc.*, 318 S.C. 95, 99, 456 S.E.2d 381, 384 (1995). As the South Carolina Supreme Court explained in *Rice*, "[t]he use of the word 'may'

signifies permission and generally means that the action is spoken of is optional or discretionary. Thus, by using ‘may’, rather than ‘shall’, the legislature has provided that the penalty is discretionary with the judge.” *Id.*, at 98 (internal citations and quotations omitted).

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. S.C. Code Ann. § 41-10-80(c) (Supp. 1993); *Rice*, 318 S.C. at 98-99, 456 S.E.2d at 383; *see also Morin v. Innegrity*, 424 S.C. 559, 574, 819 S.E.2d 131,139 (Ct. App. 2018). An “employer is protected from penalties if there is a good faith dispute over wages allegedly due.” *Rice*, 318 S.C. at 99, 456 S.E.2d at 383. As the Supreme Court has explained, “[t]he imposition of treble damages in those cases where there is a bona fide dispute would be unjust and hard.” *Id.*, at 98, 456 S.E.2d at 383. The Supreme Court further explained in *Rice*:

[T]here are some wage disputes when the issue may involve a valid close question of law or fact which should properly be decided by the courts. We do not believe the legislature intended to deter the litigation of reasonable good faith wage disputes; we do believe the legislature intended to punish the employer who forces the employee to resort to the court in an unreasonable or bad faith wage dispute.

Id., at 99, 456 S.E.2d at 384.

In this case, Wells accepted the Respondents’ offer of judgment for the exact amount of unpaid wages claimed by Wells. Wells contends that the accepted offer of judgment is sufficient to establish his entitlement to treble damages. This contention is without merit. As noted above, treble damages are

discretionary and not awarded as a matter of right. Additionally, South Carolina courts have repeatedly made clear that 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.” *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 600, 675 S.E.2d 414, 415 (2009); *O’Neal v. Intermedical Hosp. of South Carolina*, 355 S.C. 499, 585 S.E.2d 526 (Ct. App. 2003). Accordingly, even if the acceptance of Respondents’ offer of judgment could be interpreted as a finding that Wells is entitled to recover unpaid wages, it “is not equivalent to a finding that there existed no bona fide dispute as to the employee’s entitlement to those wages.” *Id.*

In order for Wells to be eligible to be considered for an award of penalties, including treble damages and attorneys’ fees, the court must first find that there existed no bona fide dispute as to the employee’s entitlement to those wages. At the time Wells accepted Respondents’ offer of judgment, the only documents before the court were the complaint and the Respondents’ answer. While Wells’s complaint averred that Respondents had acted in bad faith, Respondents’ answer specifically denied that Wells was entitled to penalties under the Wage Payment Act because there was a “*bona fide* dispute over whether the wages claimed were owed.” Respondents further averred that their “actions were in good faith and based upon a reasonable belief that no wages were owed” and “any alleged actions by [Respondents] were done without an intent to harm or reckless indifference”. Thus, while Wells’s acceptance of the offer might be interpreted as an acknowledgement that Wells was entitled to unpaid wages, there was a

genuine issue of fact as to whether Wells was entitled seek an award of discretionary penalties under the Act.

Wells then sought penalties, including treble damages and attorneys' fees, based on the accepted offer of judgment despite the fact that there was no record before the court to support the discretionary award of such penalties. In fact, the only thing before the court were the parties' pleadings. As such, at the hearing before the circuit court on May 20, 2019, the court appropriately asked: "what's in the record that shows there's not a bonafide dispute? I mean, I don't – there's no record for this Court to even look at.... So how can I make a ruling that there was not a bonafide dispute?" Wells's counsel directed the court to the attachments to his motion and suggested that the "trial court" could make a determination as to the fact. Nonetheless, the court pointed out that it did not try the case and asked: "what's in the record for me to make a finding either way". Ultimately, the court appropriately concluded that "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."

The circuit court's conclusion was correct. There was nothing in the record to establish the existence of no bona fide dispute. The record before the court at the time of Wells's motion for penalties included the complaint, the answer, the offer of judgment, Wells's acceptance of the offer, and Wells's motion for treble damages and fees. Moreover, because South Carolina courts have definitively stated that 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," *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 600, 675 S.E.2d 414, 415 (2009), the acceptance of the offer of judgment, without more, was insufficient to support a finding that discretionary penalties under the Wage Payment Act were appropriate. There was nothing in the record to support a finding that there was no bona fide dispute such that discretionary penalties under the Wage Payment Act were appropriate. As such, the circuit court's decision must be affirmed.

While the circuit court concluded that "there was no record from which to determine whether attorney's fees and treble damages were appropriate under this statute", this court "can take its own view of the facts", when reviewing the court's decision with regard to an award of penalties pursuant to the South Carolina Wage Payment Act. *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 South Carolina*, 355 S.C. 499,509-511, 585 S.E.2d 526, 532 (Ct. App. 2003). Therefore, this court may review the facts in the record to determine whether the employer reasonably withheld wages and whether there was a bona fide dispute as to the wages claimed to be owed. If the court conducts its own review, "the 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).

Treble damages are only intended to "punish the employer who forces the employee to resort to the court in an unreasonable or bad faith wage dispute." *Rice*, 318 S.C. at 99, 456 S.E.2d at 383. In this case, as explained above, there is

no evidence in the record to establish that Respondents forced Wells to resort to the court in an unreasonable or bad faith wage dispute. To the contrary, the only documents relating to the wage dispute in the record before the circuit court are three emails between Wells and the human resources manager for Respondent, Vetech, LLC, that were attached to Wells's own motion for treble damages and attorneys' fees. In these emails, Wells states that he has outstanding compensation and expense reimbursements and itemizes what he believes to be outstanding. The human resources manager responds:

I have attached a payroll schedule for your review. I can assure you that based on your start date of September 19th, you were paid during the October 14th pay date. Please allow me time to review the final pay period of your employment. This will be a priority that I will complete ASAP. Thank you for your patience in this matter.

This is the only document in the record before the court outside of the pleadings that relates to Wells's claim for penalties. This exchange certainly does not reveal the Respondents to have been acting in bad faith or unreasonably. To the contrary, this email exchange, which was attached to Wells's motion for treble damages and attorneys' fees, reveals that the parties had a bona fide dispute as to whether Wells was entitled to compensation for the final pay period of his employment. An "employer is protected from penalties if there is a good faith dispute over wages allegedly due." *Rice*, 318 S.C. at 99, 456 S.E.2d at 383. As such, a review of the facts reveals that the circuit court appropriately denied Wells's motion for penalties, including treble damages, under the S.C. Wage Payment Act. This Court should affirm the circuit court's decision with regard to Wells's claim for treble damages.

B. Attorneys' Fees

Wells also contends that his acceptance of the offer of judgment under the South Carolina Rules of Civil Procedure entitles him to collect attorneys' fees. The circuit court disagreed with Wells and denied his claim for attorneys' fees. The circuit court's ruling was correct and should be affirmed. Wells is not entitled to attorneys' fees simply because he accepted the Respondents' offer of judgment.

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. *Steinert v. Lanter*, 284 S.C. 65, 66, 325 S.E.2d 532, 533, 533 (1985) (holding a prior statute governing offers of judgment must be strictly construed to allow recovery of costs and not attorneys' fees); *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). Therefore, when addressing Wells's demand for attorneys' fees, the inquiry becomes whether a party who accepts an offer of judgment pursuant to Rule 68 qualifies for the purposes of attorneys' fees. As articulated above with regard to Wells's claim for treble damages and as explained further below, Wells does not.

Wells contends that whether he is entitled to attorneys' fees is governed by the South Carolina Supreme Court's decision in *Hueble v. Dept. of Natural*

Resources, 416 S.C. 220, 785 S.E.2d 441 (2016). The *Hueble* decision does pertain to the award of attorneys' fees after the acceptance of judgment; however, it is not controlling in this case. *Hueble* does not apply to the extent it involves an award of attorneys' fees pursuant 42 U.S.C. § 1983. In this case, Wells sought an award of attorneys' fees pursuant to the South Carolina Wage Payment Act. S.C. Code Ann. §41-10-80 *et seq.* (Supp. 1993). Wells did not assert a § 1983 claim.

In *Hueble*, the Plaintiff asserted a claim pursuant to 42 U.S.C. § 1983. Defendant extended an offer of judgment that was accepted by the Plaintiff. The Plaintiff then sought attorneys' fees as provided under § 1983. In analyzing the Plaintiff's claim, the South Carolina Supreme Court explained that, "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.* In *Hueble*, the statute authorizing a party to collect attorneys' fees was § 1983. Looking to the statutory language of § 1983, the Supreme Court noted that Congress expressly provided that "a successful party in a § 1983 claim has a statutory right to seek attorneys' fees pursuant to the fee-shifting provision of § 1988." *Id.*, at 229, 785 S.E.2d at 465. Thus, the South Carolina Supreme Court concluded that the inquiry becomes "whether a party who accepts an offer of judgment becomes a prevailing party under § 1988 for the purpose of attorneys' fees." *Id.* Ultimately, the Court concluded that "acceptance of a Rule 68 offer falls squarely within the meaning of prevailing party" and found that the Plaintiff was entitled to an award of attorneys' fees based upon his acceptance of the offer of judgment.

The *Hueble* decision involved a determination of whether the Plaintiff was a “prevailing party” under § 1988 based on his acceptance of the offer of judgment. Wells would like for this Court to apply *Hueble* to the facts of this case. This case is not a § 1983 action and does not involve any statutory *right* to attorneys’ fees. This is a Wage Payment Act claim brought pursuant to statute that does not award mandatory attorneys’ fees as a matter of right. The circuit court correctly noted this distinction at the May 20, 2019 hearing on Wells’ motion for attorneys’ fees, stating:

I agree with you on prevailing party. But this is a totally different standard. Because this is a statute that says – it doesn’t say the prevailing party gets attorney’s fees. It says, if the trial court finds that there was no bona fide dispute and it was, I think, willful – it seems like there’s willful language in there, or something. But, I may be wrong on that. That, then the Court may find treble damages and attorney’s fees. So it’s not whether you’re a prevailing party. Because, clearly, when you have an offer of judgment and it’s accepted, then you are the prevailing party. But how does that relate to the statutory language of the wage payment act?

The circuit court got it right. As the Supreme Court articulated the test in *Hueble*: “[i]n 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.* In this case, the statute that authorizes Wells to collect attorneys’ fees is the South Carolina Wage Payment Act. The Wage Payment Act does not have a prevailing party standard. In fact, the standard is more onerous. The South Carolina Wage Payment Act provides only for a discretionary award of penalties, including attorneys’ fees, if the court finds there was no bona fide dispute the wages were owed and the withholding was

unreasonable and done in bad faith. S.C. Code Ann. § 41-10-80(c) (Supp. 1993); *Rice*, 318 S.C. at 98-99, 456 S.E.2d at 383; *see also Morin v. Innegrity*, 424 S.C. 559, 574, 819 S.E.2d 131,139 (Ct. App. 2018). An “employer is protected from penalties if there is a good faith dispute over wages allegedly due.” *Rice*, 318 S.C. at 99, 456 S.E.2d at 383.

As articulated in detail above, the circuit court appropriately concluded that the record was insufficient to establish that there was no bona fide dispute that the wages were owed and that the withholding of the claimed wages was unreasonable and done in bad faith. The pleadings reveal that the parties disputed whether the wages were owed and the Respondents averred that any withholding of wages claimed to be owed was done in good faith. The only documents presented to the court by Wells reveal that the parties had a good faith dispute as to whether the wages were owed and that Respondents’ withholding of any wages claimed to be owed was reasonable and done in good faith. As such, Wells was not entitled to seek attorneys’ fees – or any other penalties provided by the South Carolina Wage Payment Act – because the record did not reveal that there was no bona fide dispute the wages were owed and the withholding was unreasonable and done in bad faith. The circuit court’s decision should be affirmed.

CONCLUSION

For all of the reasons set forth above, Respondents respectfully request that this Court deny Appellant’s appeal in this matter and affirm the circuit court’s May 21, 2019 Order denying Appellant’s Motion for Attorney’s Fees.

Respectfully submitted,

Hannah Rogers Metcalfe
Hannah Rogers Metcalfe, SC Bar 73046
Metcalfe & Atkinson, LLC
1395 South Church Street
Greenville, SC 29601
(864) 214-2319
Attorney for Respondents

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

The Honorable Perry H. Gravely, Circuit Court Judge

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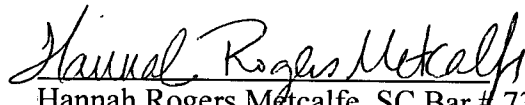
Vetech, LLC, Vetech Group, Fasttube, Process Development Corporation, and
James R. Pongracz, individually

Respondents.

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PROOF OF SERVICE

I certify that I have mailed for filing the Respondent's Initial Brief, by placing a copy of it into the U.S. Mail, postage prepaid, to the South Carolina Court of Appeals on September 20, 2019. I further certify that I have mailed the Respondent's Initial Brief to the Appellant's attorney by depositing a copy of it in the U.S. Mail, postage prepaid, address to John G. Reckenbeil, Law Office of John Reckenbeil, LLC, Post Office Box 314, Mauldin, SC 29662.


Hannah Rogers Metcalfe, SC Bar # 73046
Metcalf & Atkinson, LLC
1395 S. Church Street
Greenville, South Carolina 29605
(864) 214-2319

METCALFE & ATKINSON, LLC

ATTORNEYS AT LAW

September 20, 2019

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

**Re: Reggie ("Reg") Wells v. Vetech, LLC, Vetech Group, Fasttube, Process Development Corporation, and James R. Progracz, individually
Appellate Case No.: 2019-001038**

Dear Ms. Kitchings:

Enclosed please the original and one (1) copy of the Respondents' Initial Brief and Designation of Matter to be Included in the Record on Appeal for filing in the above-referenced case.

I would very much appreciate your filing same and returning copies to me in the enclosed self-addressed stamped envelope. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,



Hannah Rogers Metcalfe
hmetcalfe@malawfirmssc.com

HRM/awr

Enclosure

cc: John G. Reckenbeil

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METCALFE & ATKINSON, LLC
ATTORNEYS AT LAW

1395 S. CHURCH STREET • PO BOX 1826 (29602)
GREENVILLE SC 29605

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

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