

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Civil Action No.: 2010-CP-32-03172

Appellate Case No.: 2012-212705

Martha Goodwyn,..... Respondent

v.

Shadowstone Media, Inc. and Robert Pachaly,..... Appellants

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court properly award treble damages where the evidence before the jury was that the Respondent had been hired by Appellants to sell advertising and was not paid as promised; that the public interest would only be served if treble damages were imposed; and whether there was no close question of law or fact since the case was basically one of “he said”, “she said”?

2. Did the Circuit Court err in awarding attorney’s fees where the case was complex and resulted in a favorable verdict for the respondent?

STATEMENT OF THE CASE

Respondent was initially hired by Appellant Robert Pachaly on April 2, 2009 to work with him and for his various business ideas including a computer networking business, a western wear business, a freeze dried vegetable business, a dress shop for career-oriented women, and a coupon book business. At the time Mr. Pachaly hired Respondent, Mr. Pachaly had yet to create an LLC or corporation for any of these business ideas. Mr. Pachaly did, however, agree to pay Respondent at least \$250 per week, (see deposition transcript of Robert Pachaly, p.80, 16-13).

Mr. Pachaly did ultimately form a company called Shadowstone Media, Inc. on April 8, 2009 for the coupon book idea and Nyquist Engineering, Inc. on June 4, 2009 for his computer networking idea, both with no capital, and ran the computer networking idea and coupon book idea out of his office. To Respondent's knowledge, while performing some preliminary work for the western wear business, freeze dried vegetable business and the career oriented business women dress shop ideas, Respondent does not believe that Mr. Pachaly ever formed a company for these ideas. Regardless of what activities Respondent performed and regardless of the business idea she was working on, when Mr. Pachaly did pay Plaintiff, he would pay her on Shadowstone Media, Inc. checks despite the fact that all or a portion of the work she was doing was not for Shadowstone Media, Inc.

At some point during her employment with Mr. Pachaly, Mr. Pachaly brought the western wear business, freeze dried vegetable business, and the career oriented business women dress shop business ideas to Respondent and asked her to perform work on these business concepts by evaluating his business model, requesting input on sales techniques, and accompanied him to existing stores for her evaluation of the existing market, the

potential competition, and her opinion and advice on the viability of these business ideas. Respondent performed this work and to Respondent's knowledge, Mr. Pachaly decided not to pursue these three business idea further than the planning stages.

When Shadowstone Media, Inc. failed, Mr. Pacahaly asked Respondent to continue working for him as a salesperson selling computer networking solutions for Nyquist Engineering, Inc. Mr. Pachaly eventually formed a corporation, again with no capital, called Nyquist Engineering, Inc. Mr. Pachaly provided sales materials to Respondent, trained her and asked Respondent to solicit sales for this company, which she did. Mr. Pacahaly ultimately stopped paying Respondent and Respondent was forced to resign to stay home to care for the children she was paying to keep in day care while she worked for Mr. Pachaly and Nyquist Engineering, Inc.

Respondent filed an action for breach of contract and for violations of the S.C. Payment of Wages Act, S.C. Code Ann. §41-10-10 et. seq., on October 2, 2009 in Richland County. Defendant motion to change venue to Lexington County was eventually granted and the case was ultimately tried in Lexington County before a jury on June 5, 2012. After the jury returned a verdict in favor of Plaintiff for \$3,444.00, Plaintiff moved the court to exercise its discretion in trebling the award and for attorney's fees and costs pursuant to S.C. Code Ann. §41-10-80 of the Payment of Wages Act. The Court granted Plaintiff's motion, trebled the jury award and granted costs and one-half of the attorney's fees requested for a total judgment of \$16,416.50. Appellant then filed a timely notice of appeal to the Court of Appeals.

STANDARD OF REVIEW

Actions seeking damages for breach of contract and 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, the 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).

ARGUMENT

I. **The trial court properly found that no *bona fide* dispute existed.**

The trial court found that there was no *bona fide* dispute such that it would constitute a good faith defense to the failure to pay wages under the facts of this case. Order at p. 2. Appellant devotes a substantial amount of time and effort to asserting that the “hiring letter” which Appellant asserted he gave to Respondent – but which Respondent testified she never saw until before her deposition – represents evidence of a *bona fide* dispute such that the trebling of damages was unwarranted and in error. Initial Brief of Appellant. Regardless, it is undisputed that the Respondent testified that she never saw the letter until the lawsuit commenced and the Appellant asserted otherwise. It is further undisputed that the letter was before the jury as Plaintiff’s Exhibit 2. The trial court held while it did “not know what weight or value the jury gave to the “hiring letter”, if any, but [the court] concludes that this would not constitute a *bona fide* good faith defense to the failure to pay wages under the facts of this case.” Order at p. 2.

Under S.C. Code Ann. §41-10-80, 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. Mathis v. Brown & Brown , 698 S.E.2d 773, 781 (S.C. S. Ct. 2010). The imposition of treble damages and fees is discretionary with the trial judge. Rice v. Multimedia, 456 S.E.2d 381(1985). The Court noted that the imposition of treble damages in those case where there was a bona fide dispute would be unjust and harsh. A bona fide dispute, for example, is a valid close question of law or fact which should properly be decided by the courts. Rice.

In Mathis, the employer, an insurance brokerage, sought to reverse the award of treble damages to its sales manager by establishing that one of its defenses to the complaint constituted a bona fide dispute or good faith dispute. The Court noted that S.C. Code Ann. 41-10-40 generally requires an employer to timely pay all wages due.

The Court rejected this reasoning, noting that the standard was whether, at the time the compensation was withheld, the employer had a reasonable good faith reason for doing so. In short, the Act is designed to punish the employer who forces the employee to resort to the court in an unreasonable or bad faith wage dispute. The Court held that the trial court correctly found that there was a clear written contract of definite term, and therefore there was no bona fide dispute as to wages due under the guaranteed contract, and upheld the award of treble damages. 698 S.E.2d at 781-782.

Similarly, in Ross v. Ligand Pharmaceuticals, 639 S.E.2d 460 (S.C. Ct. App. 2006), the Court found that the lower court's award of treble damages was proper where the employer's decision not to pay the commission/bonus to the plaintiff was unilateral and arbitrary. The Court found that employer's pay schedule was unreasonable since

there was no set date when checks would be cut, and the employer had mandated that only those employees actually employed on the date when the checks were cut could receive their earned commission/bonus. In short, the Court held that since the payment date was totally amorphous, the employer was unreasonable and there was no good faith dispute, thereby upholding the award of treble damages. Id. at 465.

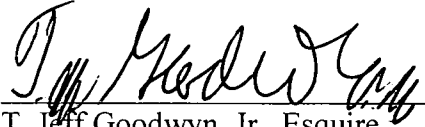
Similarly, in this case, the jury clearly found that Appellant promised to pay Respondent an amount of money that he did not pay. As a result, they awarded her the actual damages based on this failure to live up to this promise to pay. In Mathis and Ross, the employers had arguments for why they didn't pay the wages, but the jury found them not persuasive, found for the employee, and the court's discretionary treble damages and attorney's fees awards were upheld in each case. Simply because the employer in this case believes that the hiring letter created a close call for the jury does not mean the trial judge abused its discretion or that it incorrectly found that the hiring letter "would not constitute a bona fide good faith defense to the failure to pay wages under the facts of this case." Order at p. 2. For these reasons and for any other reasons as may be found in the record, Respondent respectfully asks this court to affirm the trial judge's Order in full.

CONCLUSION

The trial court was in the best position to determine whether there was a bona fide good faith defense to the failure to pay wages under the facts of this case and it found that there was not. The court also determined that the trebling of the award was necessary to protect Respondent from the unjustified and willful retention of wages by Appellant. As evidenced by its Order, the trial court weighed the necessary factors and concluded that

there was no bona fide dispute and this decision should not be disturbed. For these reasons and for any other reasons as may be found in the record, Respondent respectfully asks this court to affirm the trial judge's Order in full.

Respectfully submitted,

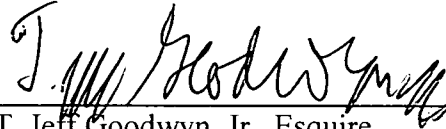


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CERTIFICATE OF COUNSEL

The undersigned certifies that this Initial Brief of Respondent complies with Rule 211(b), SCACR.



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