

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA
NO.: 2021-CA-0313

MASHANNA GALLO, *Appellee*

VERSUS

GREENPATH INTERNATIONAL, INC., *Appellant*

CIVIL APPEAL FROM ORLEANS PARISH FIRST CITY COURT,
NO.: 2020-00443, DIVISION B,
HONORABLE NADINE RAMSEY PRESIDING

ORIGINAL BRIEF ON BEHALF OF APPELLEE MASHANNA GALLO

CIVIL PROCEEDING

Respectfully submitted:

STERNBERG, NACCARI & WHITE, LLC

SCOTT L. STERNBERG, La. Bar No. 33390
M. SUZANNE MONTERO, La. Bar No. 21361
935 Gravier Street, Suite 2020
New Orleans, Louisiana 70112
Telephone: 504.324.2141
Facsimile: 504.534.8961
scott@snw.law | suzy@snw.law
Counsel for Mashanna Gallo

LAW OFFICE OF NATALIE K. MITCHELL

NATALIE K. MITCHELL, La. Bar No. 32599
935 Gravier Street, Suite 2020
New Orleans, Louisiana 70112
Telephone: 228-342-1430
nataliemitchell@gmail.com
Co-counsel for Mashanna Gallo

I. TABLE OF CONTENTS

| <u>SECTION</u> | <u>Pages</u> |
|---|---------------------|
| I. TABLE OF CONTENTS | 1 |
| II. TABLE OF AUTHORITIES | 2 |
| III. STATEMENT OF THE CASE | 3 |
| IV. APPELLANT’S MOTION AND ORDER TO APPEAL WAS NOT TIMELY | 3-8 |
| 1. Greenpath’s October 14, 2021 Notice of Appeal Was Untimely | 6-7 |
| 2. Greenpath’s February 8, 2021 Notice of Appeal Was Untimely | 7-8 |
| V. APPELLANT’S NONCONFORMING BRIEF | 8-9 |
| VI. STATEMENT OF FACTS | 9-10 |
| VII. SUMMARY OF THE ARGUMENT | 11 |
| VIII. ARGUMENT | 11-20 |
| 1. The Trial Court Did Not Err in Finding Greenpath Liable under the Wage Payment Act | 11-17 |
| 2. The Trial Court Did Not Err in Awarding Vacation Pay, Penalties, and Attorneys’ Fees | 18-20 |
| IX. RELIEF SOUGHT | 20 |

II. TABLE OF AUTHORITIES

| <u>STATUTES</u> | Pages |
|--|------------------|
| La. Civ. Code art. 1 | 14 |
| La. Civ. Code art. 3 | 14 |
| La. R.S. 23:631 | 3, 10, 12, 18 |
| La. R.S. 23:632 | 12, 18, 19 |
| La. R.S. 23:634 | 12, 14 |
| La. C.C.P. art. 5002 | 3-4, 6-8 |
| La. C.C.P. art. 1913 | 4, 6 |
| <u>CASES</u> | |
| <i>Albitar v. Albitar</i> , 16-167 (La. App. 5 Cir. 6/30/16), 197 So. 3d 332, 340. | 6-7 |
| <i>Bank of Am., N.A. v. Clower</i> , 44,749 (La. App. 2 Cir. 9/23/09), 24 So. 3d 911, 913, <i>writ denied</i> , 2009-2330 (La. 1/8/10), 24 So. 3d 873. | 6 |
| <i>Beard v. Summit Inst. of Pulmonary Med. & Rehabilitation</i> , 97-1784, (La. 3/4/1998)707 So. 2d 1233, 1234-1235. | 3, 13 |
| <i>Bergeron v. Richardson</i> , 2020-01409, p.7 (La. 6/30/21) 2021 WL 2679021. | 14 |
| <i>Carlisle v. Carlisle</i> , 12,626 (La. 2nd Ct. App.), 313 So. 2d 908, 909, <i>writ denied</i> , 319 So. 2d 442 (La. 1975). | 6-7 |
| <i>Jeansonne v. Schmolke</i> , 2009-1467 (La. App. 4 Cir. 5/19/10), 40 So. 3d 347, 361. | 11, 18 |
| <i>Kaplon v. Rimkus Consulting Grp., Inc. of Louisiana</i> , 2009-1275 (La. App. 4 Cir. 4/28/10), 39 So. 3d 725, 733–34, <i>writ denied sub nom. Kaplon v. Rimkus Consulting Grp., Inc.</i> , 2010-1207 (La. 7/2/10), 39 So. 3d 587. | 17, 20 |
| <i>Leprette v. RCS, LLC</i> , 16-382, 206 So. 3d 1215 (La. App. 3 Cir. 2016). | 10, 13 |
| <i>Martin v. Martin</i> , 3,889 (App. 4 Cir. 1969), 228 So.2d 355. | 4 |
| <i>Newsom v. Global Data Systems, Inc.</i> 12-412, pp.7-8 (La. App. 3 Cir, 12/12/12), 107 So. 3d 781, 787-88, <i>writ denied</i> , 110 So 3d 595. | 10, 13-14 |
| <i>N. Am. Land Dev. v. Tucker</i> , 25,991 (La. App. 2d Cir. 1994) 637 So. 2d 654, 655. | 4 |
| <i>Padian v. Algiers Charter Sch. Ass'n, Inc.</i> , 2019-0201 (La. App. 4 Cir. 6/19/19), 274 So. 3d 1266, 1268. | 15 |
| <i>Rodriguez v. Green</i> , 2012-0098 (La. App. 4 Cir. 6/20/12), 111 So. 3d 1, 5. | 11, 19 |
| <i>Saacks v. Mohawk Carpet Corp.</i> , 2003-0386 (La. App. 4 Cir. 8/20/03), 855 So. 2d 359, 363–64, <i>writ denied</i> , 2003-2632 (La. 12/12/03), 860 So. 2d 1158. | 11 |
| <i>Tarver v. Anderson</i> , 358 So.2d 1000 (La. App. 3 Cir.1978). | 7 |
| <i>X–L Finance Company v. Hollinger</i> , 185 So.2d 873 (La. App. 3 Cir.1966). | 7 |

III. STATEMENT OF THE CASE

In January 2020, Plaintiff/Appellee Ms. Mashanna Gallo (“Ms. Gallo”) filed this case under the Louisiana Wage Payment Act (“the Act”) for unpaid wages due to her at the time of her resignation from Defendant/Appellant Greenpath International, Inc. (“Greenpath”).¹ After a trial was held on July 30, 2020 at the Orleans Parish First City Court, the Honorable Nadine Ramsey found in favor of Ms. Gallo and awarded her unpaid wages, penalties, and attorneys’ fees and costs as mandated by the Act.²

The statutes that comprise The Louisiana Wage Payment Act, La. R.S. 23:631 *et seq.*, were “designed to assure the prompt payment of wages upon an employee’s discharge or resignation.”³ Ms. Gallo resigned her position in July 2019. To date, for over seven hundred days, Greenpath has refused to pay Ms. Gallo her earned wages; instead asserting set offs for training costs and penalties for alleged breach of contract that are not allowed by law. Greenpath’s argument conflicts with the clear wording of the statute and established jurisprudence. The Trial Court judgment should be affirmed along with additional attorneys’ fees awarded to Ms. Gallo for this appeal.

IV. APPELLANT’S MOTION AND ORDER TO APPEAL WAS NOT TIMELY

Greenpath has filed two Notices of Appeal, neither of which were filed within the deadlines established by statute and as a result, the 4th Circuit Court of Appeal does not have jurisdiction over this case. Louisiana Code of Civil Procedure article 5002 provides:

A. An appeal from a judgment rendered by a city court or a parish court may be taken **only within ten days** from the

¹ Ms. Gallo’s Petition for Unpaid Wages, Record Docs. 1-4.

² September 21, 2020 Judgment, Record Docs. 113-115.

³ *Beard v. Summit Inst. of Pulmonary Med. & Rehabilitation*, 97-1784 (La. 3/4/1998), 707 So. 2d 1233, 1234-1235 (citing *Boudreaux v. Hamilton Medical Group, Inc.*, 94-0879 (La. 10/17/94), 644 So. 2d 619, 622; *Mason v. Norton*, 360 So. 2d 178, 180 (La. 1978)).

date of the judgment or from the service of notice of judgment, when such notice is necessary.

B. When an application for new trial is timely filed, however, the delay for appeal commences on the day after the motion is denied, or from service of notice of the order denying a new trial, when such notice is necessary.⁴

Louisiana Code of Civil Procedure article 1913 provides, in pertinent part:

A. Except as otherwise provided by law, notice of the signing of a final judgment, including a partial final judgment under Article 1915, is required in all contested cases, and shall be mailed by the clerk of court to the counsel of record for each party, and to each party not represented by counsel.

...

D. The clerk shall file a certificate in the record showing the date on which, and the counsel and parties to whom, notice of the signing of the judgment was mailed.⁵

To timely perfect a suspensive appeal from a City Court judgment, the appeal bond as well as the motion for appeal must be filed within the article 5002 ten-day period.⁶ Appellate courts acquire jurisdiction only where an order of appeal has been signed and security furnished within time prescribed by law.⁷

The relevant dates are as follows:

- September 21, 2020 – Judgment was rendered.⁸
- September 21, 2020 – Court Clerk mailed Notice of Signing Judgment to Greenpath’s counsel.⁹ However, the clerk sent the Notice of Signing Judgment to the wrong suite number.¹⁰ It was mailed to Suite 100 instead of Suite 1100,

⁴ La. C.C.P. art. 5002 (emphasis added).

⁵ La. C.C.P. art. 1913.

⁶ *N. Am. Land Dev. v. Tucker*, 25,991 (La. App. 2d Cir. 1994) 637 So. 2d 654, 655 (citing *The Research Group, Inc. v. Sharp*, 430 So.2d 165, 167 (La. App. 2d Cir. 1983); *Associated Agencies, Inc. v. LaBorde*, 315 So.2d 430 (La. App. 4th Cir.1975) (applying former C.C.P. article 5002); *Haywood v. Salter*, 421 So.2d 1190, 1194 (La.App. 2d Cir. 1982); *Dusenberry v. Andrus*, 510 So. 2d 386, 387 (La. App. 1st Cir. 1987).

⁷ *Martin v. Martin*, 3889 (App. 4 Cir. 1969), 228 So.2d 355.

⁸ Record Docs. 109-11.

⁹ Record Doc. 112.

¹⁰ *Id.*

at One Galleria Blvd., Metairie, LA 70001.¹¹ Greenpath’s Counsel maintains that it never received the Notice of Signing Judgment.¹²

- October 12, 2020 – Greenpath filed a pleading captioned: “Notice of Intent to Appeal and Request for Return Date Pursuant to Rule 4.3” (“First Notice of Appeal”), twenty-one (“21”) days from the date the Clerk mailed notice to Greenpath’s counsel.¹³
- October 20, 2020 – Judge Ramsey ordered Greenpath’s Appeal “as prescribed by law.”¹⁴
- October 30, 2020 – Greenpath filed a pleading entitled “Motion for New Trial.”¹⁵ In that “Motion for New Trial” Greenpath did not actually seek a new trial.¹⁶ Greenpath did not allege any of the statutory grounds for a court to grant a new trial.¹⁷ Instead, Greenpath sought – via a Motion for New Trial - to have the trial court declare that its Notice of Intent to Appeal, filed twenty-three days after the Notice of Signing Judgment was mailed by the Clerk, was timely.¹⁸
- January 7, 2021 – Hearing was held on Greenpath’s “Motion for New Trial.”¹⁹
- January 15, 2021 – Judge Marissa Hutabarat granted the “Motion for New Trial” and granted Greenpath leave to file a new notice of intent to appeal.²⁰
- January 15, 2021 – The Clerk of Court mailed the Notice of Signing Judgment to Greenpath’s Counsel.²¹

¹¹ *Id.*

¹² Greenpath’s “Motion for New Trial,” Record Doc. 121.

¹³ Greenpath’s “Notice of Intent to Appeal and Request for Return Date Pursuant to Rule 4.3, Record Doc. 113-14.

¹⁴ Judge Ramsey’s Order, Record Doc. 117.

¹⁵ Greenpath’s “Motion for New Trial,” Record Doc. 121.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Judge Hutabarat’s Judgment, Record Doc. 192.

²⁰ *Id.*, Record Docs. 192-98.

²¹ Notice of Signing Judgment, Record Doc. 198.

- February 8, 2021 – Greenpath filed its second “Notice of Intent to Appeal Suspensively and Request for Return Date Pursuant to Rule 4.3,” twenty-four (“24”) days following the Clerk’s mailing of notice.²² Also, Greenpath submitted a suspensive appeal bond in the amount of \$25,698.57.²³
- May 26, 2021 – This Court ordered Greenpath to show cause, in writing, within ten days, why the Appeal should not be dismissed as untimely.
- June 4, 2021 – Greenpath filed a response, stating that Greenpath’s Counsel did not receive the Notice of Judgment mailed on January 15, 2021 until February 4, 2021, twenty (“20”) days later.²⁴

1. Greenpath’s October 14, 2021 Notice of Appeal Was Untimely

On September 21, 2020, the Clerk mailed Notice of Judgment to Greenpath’s counsel of record, albeit with an incorrect suite number but otherwise correct address, and filed a certificate showing the date of mailing into the record.²⁵ On October 14, 2020, twenty-three (“23”) days following the mailing of the Notice of Judgment, Defendant filed a “Notice of Intent to Appeal and Request for Return Date Pursuant to Rule 4.3.”²⁶ The trial court properly dismissed the appeal “as prescribed by law, because Greenpath failed to meet the Article 5002 ten-day deadline.²⁷ Additionally, by filing the Appeal Notice, Greenpath waived any right to assert a lack of service of the Notice of Judgment under La. C.C. P. art.1913.²⁸ As explained in the case of *Albitar v. Albitar*,

²² Greenpath’s “Notice of Intent to Appeal Suspensively and Request for Return Date Pursuant to Rule 4.3,” Record Doc. 201-02.

²³ *Id.*, Record Doc. 201.

²⁴ Defendant’s Response to Court’s Request Dated May 26, 2021 following Application for Supervisory Writ to Review the Ruling of the Civil District Court for the Parish of Orleans Docket No. 2020-00443, September 21, 2020 judgment by Honorable Judge Marissa A. Hutabarat, p. 2.

²⁵ Notice of Signing Judgment, Record Doc. 112.

²⁶ Notice of Intent to Appeal and Request for Return Date Pursuant to Rule 4.3, Record Doc. 113-114.

²⁷ Judge Ramsey’s Order, Record Doc. 117.

²⁸ *Carlisle v. Carlisle*, 12626 (La. 2nd Ct. App.), 313 So. 2d 908, 909, *writ denied*, 319 So. 2d 442 (La. 1975); *Albitar v. Albitar*, 16-167 (La. App. 5 Cir. 6/30/16), 197 So. 3d 332, 340; *Bank of Am.*,

Louisiana courts have reasoned that the requirement that the clerk of court mail notice of final judgment is to give parties notice of judgment in order to timely move for a new trial or an appeal.²⁹ When a party who has not received proper notice of judgment files a motion for appeal of that same judgment, the party clearly has actual notice of the judgment. Accordingly, if a party moves for and is granted an appeal prior to service of notice of judgment, he is deemed to either have notice or to waive notice.³⁰

If Greenpath hadn't received proper service of the Judgment, it should have filed an exception of insufficient service of judgment. Instead, Greenpath filed a Notice of Appeal, thereby waiving its right to assert insufficient service of judgment. As such, Greenpath's appeal was properly dismissed by the trial court. Accordingly, Greenpath's "Motion for New Trial" should not have been granted by the trial court. Greenpath should not have been granted additional time to file its appeal.

2. Greenpath's February 8, 2021 Notice of Appeal Was Untimely

There was hearing on Greenpath's Motion for New Trial held on January 15, 2021. At that hearing, Judge Hutabarata advised all counsel that her chamber would reissue the Notice of Signing of Judgment – this time to the correct suite number for the Chehardy Sherman lawfirm.³¹ On January 15, 2021, the Clerk of Court mailed the Notice of Judgment granting Greenpath's "Motion for New Trial" to Greenpath's counsel.³² On February 8, 2021, twenty-four days later, Greenpath filed its second "Notice of Intent to Appeal Suspensively and Request for Return Date Pursuant to Rule 4.3," and appeal bond.³³ Greenpath's counsel stated that the U.S. mail took

N.A. v. Clower, 44,749 (La. App. 2 Cir. 9/23/09), 24 So. 3d 911, 913, *writ denied*, 2009-2330 (La. 1/8/10), 24 So. 3d 873; *Tarver v. Anderson*, 358 So.2d 1000 (La. App. 3 Cir.1978).

²⁹ *Albitar v. Albitar*, 16-167 (La. App. 5 Cir. 6/30/16), 197 So. 3d 332, 340 (*citing Bank of A.M. v. Clower*, 44,749 (La. App. 2 Cir. 9/23/09), 24 So.3d 911, 916, *writ denied*, 09-2330 (La.1/8/10), 24 So.3d 873; *X-L Finance Company v. Hollinger*, 185 So.2d 873 (La.App. 3 Cir.1966).

³⁰ *Id.* (*citing Bank of A.M.*, 24 So.3d at 916; *Tarver v. Anderson*, 358 So.2d 1000 (La.App. 3 Cir.1978); *Carlisle v. Carlisle*, 313 So.2d 908 (La.App. 2 Cir.1975), *writ denied*, 319 So.2d 442 (La.1975).

³¹ The transcript for that hearing was not transcribed and is not part of the record.

³² Notice of Signing Judgment, Record Doc. 198.

³³ Notice of Intent to Appeal Suspensively and Request for Return Date Pursuant to Rule 4.3, Record Doc. 201-02.

twenty days to deliver the Notice of Judgment from the Orleans Parish Civil District Court to One Galleria Boulevard, in Metairie.³⁴ Article 5002 requires that a motion for appeal may be filed only within ten days from the service of the notice of judgment in a city court case.³⁵ Greenpath's February 8, 2021 Notice of Appeal was not filed within the jurisdictional deadline established by Article 5002 and must be dismissed.

V. APPELLANT'S NONCONFORMING BRIEF

Greenpath's Appellant's Brief does not conform in several instances with the Uniform Rules of Louisiana Courts of Appeal the Rules ("the Rules"). Section 2-12.13 provides that briefs "not in compliance with these Rules may be stricken in whole or in part by the court, and the delinquent party or counsel of record may be ordered to file a new or amended brief." The defects in Greenpath's Brief include:

- **Table of Contents:** Greenpath's Brief does not include a Table of Contents, as required by Rule 2-12.4(1).
- **Jurisdictional Statement:** Greenpath's Jurisdictional Statement does not include "the date of the judgement appealed and of the motion and order for appeal to establish the timeliness of the appeal" nor does it include "an assertion that the appeal is from a final appealable judgment..." as required by Rule 2-12.4(A)(3).³⁶
- **Standard of Review:** Greenpath's Appellant's Brief does not mention the applicable standards of review in any fashion – whether by a specific section of the brief dedicated to conformity with the mandate of Rule 2-12.4(A)(9) or referenced in passing in the body of the brief.

³⁴ Defendant's Response to Court's Request Dated May 26, 2021 following Application for Supervisory Writ to Review the Ruling of the Civil District Court for the Parish of Orleans Docket No. 2020-00443, September 21, 2020 judgment by Honorable Judge Marissa A. Hutabarat, p. 2.

³⁴ Notice of Signing Judgment, Record Doc. 112.

³⁵ La. C.C.P. art. 5002.

³⁶ Greenpath's Appellant's Brief, p. 3.

- **Copy of Judgment:** Greenpath did not append a copy of the Judgment to its Brief, as required by Rule 2-12.4(B)(1).

- **Citations to the Record:** Greenpath’s Statement of Facts includes unsubstantiated, disputed allegations that do not reference “specific page numbers of the record” as required by Rule 2-12.4(A)(7).³⁷ Greenpath’s Argument contains numerous unsubstantiated, disputed factual allegations and legal conclusions that do not reference “specific page numbers to the record” or “citations on which the appellant relies,” as required by Rule 2-12.4(A)(9)(a).

VI. STATEMENT OF FACTS

Plaintiff/Appellee Mashanna Gallo is a former employee of Defendant/Appellant Greenpath International, Inc.³⁸ She worked in the role of Mental Health Professional from January 2019 until her resignation in July 2019.³⁹ At the time of her resignation, Greenpath owed Ms. Gallo one thousand one hundred twenty dollars (\$1,120.00) in hourly wages and eight hundred thirty-two dollars and twenty cents (\$832.20) in accrued but unused vacation pay.⁴⁰

Shortly after her resignation, Ms. Gallo received a letter from Greenpath stating that Greenpath would be deducting \$976.89 from her final paycheck for “breaching your contract and training incurred.”⁴¹ The letter further stated that Ms. Gallo deprived Greenpath access to client files by taking keys from the premises and not returning them timely.⁴² Ms. Gallo disputes Greenpath’s allegations that she breached the contract and denied Greenpath access to client files.⁴³ Ms. Gallo

³⁷ Greenpath’s Appellant’s Brief, p. 3.

³⁸ Petition for Unpaid Wages, Record Doc. 1.

³⁹ Petition for Unpaid Wages, Exhibit B, Record Doc. 9.

⁴⁰ Trial Transcript at p. 34.

⁴¹ Greenpath’s July 26, 2019 Letter, Record Doc. 14.

⁴² Id.

⁴³ Trial Transcript at p. 33.

received a final paycheck in the amount of one hundred and nine dollars and seven cents (\$109.07).⁴⁴

After Ms. Gallo made written demand to Greenpath Director Dr. Earnest Airhia for wages due, personally and through her lawyers, Ms. Gallo filed this suit for unpaid wages on January 21, 2020.⁴⁵ Defendant answered denying liability.⁴⁶ Trial was held July 30, 2020. At trial, Greenpath's Director Dr. Earnest Airhia testified that Greenpath did not pay Ms. Gallo the wages owed to her because he had deducted training costs, and because Ms. Gallo's resignation caused Greenpath harm by limiting their access to important files requiring them to scramble to submit required documents for the probation and parole program Ms. Gallo oversaw.⁴⁷ Other than Dr. Airhia's self-serving testimony, Greenpath did not introduce any evidentiary support for these defenses and Ms. Gallo disputed the allegations.⁴⁸

On September 21, 2020, the Honorable Nadine Ramsey issued Judgment awarding Ms. Gallo one thousand one hundred twenty dollars (\$1,120.00) for hourly wages, eight hundred and thirty-two dollars and twenty cents (\$832.20) for accrued vacation, and fourteen thousand and four hundred dollars (\$14,400.00) for penalty wages.⁴⁹ The Trial Court also taxed as costs seven thousand five hundred dollars (\$7,500.00) in attorneys' fees, all court costs, and judicial interest, which continue to climb due to the legal fees incurred to defend this appeal.⁵⁰

⁴⁴ Mashanna Gallo Bank Statement, Record Doc. 15.

⁴⁵ Petition for Unpaid Wages s, p. 3, Exhibit F, Record Doc. 16.

⁴⁶ Greenpath's Answer, Record Docs. 22-28.

⁴⁷ Trial Transcript at pp. 23-25.

⁴⁸ Trial Transcript at p. 33.

⁴⁹ Judge Ramsey's Judgment, Record Docs. 109-111.

⁵⁰ Id.

VII. SUMMARY OF THE ARGUMENT

Greenpath bases its appeal on its misguided claim that the trial court relied upon the Third Circuit case of *Leprette v. RCS, LLC*.⁵¹ Greenpath is wrong. The Trial Court relied on the well-defined wording of the statute, which prohibits employers from withholding wages from their employees after the employee has resigned, in reaching its Judgment.⁵² The Trial Court also properly cited a Third Circuit case, *Newsom v. Global Data Systems, Inc.*⁵³ in its Judgment to explain how the statute is interpreted when employers apply offsets to an employee's final paycheck.

At the trial level, Ms. Gallo met her burden of proof with respect to the wages she was owed, which also entitled her to reasonable attorney's fees.⁵⁴ Greenpath did not prove any of their defenses, and the Trial Court properly awarded penalty wages as a result.⁵⁵ Ms. Gallo has incurred additional attorneys' fees related to Greenpath's Appeal.⁵⁶ The Trial Court's Judgment should be affirmed and amended to award Ms. Gallo additional attorneys' fees and the costs of this Appeal.

VIII. ARGUMENT

1. **The Trial Court Did Not Err in Finding Greenpath Liable under the Wage Payment Act**

A. **Standard of Review**

The reviewing court may not overturn the judgment of the lower court absent an error of law or finding of fact that is manifestly erroneous or clearly wrong.⁵⁷ Where there are two permissible views of the evidence, the fact finder's

⁵¹ Appellant's Brief at p. 6, par. 3; p. 7, par. 2. Appellant did not favor this court with the citation for the *Leprette* case in its brief. The citation is as follows: *Leprette v. RCS, LLC*, 16-382, 206 So. 3d 1215 (La. App. 3 Cir. 2016).

⁵² La. R.S. 23:631 *et seq.*

⁵³ Judge Ramsey's September 21, 2020 Judgment, Record Doc 109-11.

⁵⁴ *Rodriguez v. Green*, 2012-0098 (La. App. 4 Cir. 6/20/12), 111 So. 3d 1, 5 (*citations omitted*).

⁵⁵ *Jeansonne v. Schmolke*, 2009-1467 (La. App. 4 Cir. 5/19/10), 40 So. 3d 347, 361 (*citing Becht v. Morgan Bldg. & Spas, Inc.*, 02-2047, p. 4 (La.4/23/03), 843 So.2d 1109, 1112).

⁵⁶ See Exhibit A, Affidavit of Natalie K. Mitchell, attached.

⁵⁷ *Saacks v. Mohawk Carpet Corp.*, 2003-0386 (La. App. 4 Cir. 8/20/03), 855 So. 2d 359, 363-64, *writ denied*, 2003-2632 (La. 12/12/03), 860 So. 2d 1158 (*citing Stobart v. State Through Department of Transportation and Development*, 617 So.2d 880 (La.1993)).

choice between them cannot be manifestly erroneous or clearly wrong.⁵⁸ A lower court's factual findings can be reversed only when: (1) the record reflects that a reasonable factual basis does not exist for the finding of the trial court; and (2) the record establishes that the trial court's finding is clearly wrong.⁵⁹ The reviewing court is to review the evidence in the light most favorable to the prevailing party.⁶⁰ If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the appellate court may not reverse it even though it is convinced that if it had been sitting as the trier of fact, it would have weighed the evidence differently.⁶¹ Where there is a conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review.⁶²

B. The Louisiana Wage Payment Act

The following statutes are pertinent to this matter. La. R.S. 23:631(A)(1)(b) provides:

Upon the resignation of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month, on or before the next regular pay day or no later than 15 days following the date of resignation, whichever occurs first.⁶³

La. R.S. 23:632 provides:

An employer who fails or refuses to comply with the provisions of R.S. 23:631 shall be liable to the employee for 90 days wages at the employee's daily rate of pay, or else for full wages from the time the employee's demand for payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages. Reasonable attorneys' fees shall be allowed the laborer or

⁵⁸ *Id.* (citing *Rosell v. ESCO*, 549 So.2d 840 (La.1989)).

⁵⁹ *Id.* (citing *Russell v. Noullet*, 98–0816 (La.12/1/98), 721 So.2d 868, 872).

⁶⁰ *Id.*

⁶¹ *Id.* (citing *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985); *Hennegan v. Cooper/T.Smith Stevedoring Co., Inc.*, 2002–0282 (La. App. 4 Cir. 12/30/02), 837 So.2d 96, writ denied 2003–0316 (La.4/21/03), 841 So.2d 794.

⁶² *Id.* (citing *Virgil v. American Guarantee & Liability Ins. Co.*, 507 So.2d 825 (La.1987)).

⁶³ La. R.S. 23:631(A)(1)(b).

employee by the court which shall be taxed as costs to be paid by the employer, in the event a well-founded suit for any unpaid wages whatsoever be filed by the laborer or employee after three days shall have elapsed from time of making the first demand following discharge or resignation.⁶⁴

Finally, La. R.S. 23:634 provides:

No person, acting either for himself or as agent or otherwise shall require any of his employees to sign contracts by which the employees shall forfeit their wages if discharged before the contract is completed or if the employees resign their employment before the contract is completed; but in all such cases the employee shall be entitled to the wages actually earned up to the time of their discharge or resignation.⁶⁵

These statutes were “designed to assure the prompt payment of wages upon an employee's discharge or resignation.”⁶⁶ The record shows that Ms. Gallo was owed wages at the time of her resignation and that Greenpath refused to pay Ms. Gallo’s wages despite numerous demands from Ms. Gallo and her attorneys. Greenpath failed to establish any allowable affirmative defenses. Thus, the Trial Court correctly judged Greenpath liable to Ms. Gallo for unpaid wages.

C. The Trial Court’s Judgment

In its Appellant’s Brief, Greenpath wrongly asserts that the trial court relied upon the case of *Leprette v. RCS, LLC*,⁶⁷ in concluding that Greenpath was liable to Ms. Gallo for unpaid wages.⁶⁸ Actually, Judge Ramsey’s Judgment cited a different case, *Newsom v. Global Data Systems, Inc.*⁶⁹ The Trial Court’s Judgment never mentions – much less cites – the *Leprette* case. It states, in pertinent part:

⁶⁴ La. R.S. 23:632.

⁶⁵ La. R.S. 23:634.

⁶⁶ *Beard v. Summit Inst. of Pulmonary Med. & Rehabilitation*, 97-1784, (La. 3/4/1998)707 So. 2d 1233, 1234-1235 (citing *Boudreaux v. Hamilton Medical Group, Inc.*, 94-0879 (La. 10/17/94), 644 So. 2d 619, 622; *Mason v. Norton*, 360 So. 2d 178, 180 (La. 1978)).

⁶⁷ Appellant’s brief does not provide a citation for the *Leprette* case. The citation is as follows: *Leprette v. RCS, LLC*, 16-382, 206 So. 3d 1215 (La. App. 3 Cir. 2016).

⁶⁸ See Appellant’s Brief at p. 6, par. 3; p. 7, par. 2.

⁶⁹ Judge Ramsey’s Judgment, Record Doc 109-11; *Newsom v. Global Data Systems, Inc.* 12-412, pp.7-8 (La. App. 3 Cir, 12/12/12), 107 So. 3d 781, 787-88, *writ denied*, 110 So 3d 595.

Louisiana law is clear that it is against public policy to take a setoff unless the setoff is for specific things such as loans, damages caused by an employee, lost equipment, uniforms, over-payment from a previous paycheck, or property that is being improperly retained by the employee. *See Newsom v. Global Data Systems, Inc.* (La. App. 3 Cir, 12/12/12), 107 So. 3d 781, *writ denied*, 110 So 3d 595. There was no testimony proving any of these factors.⁷⁰

Like *Leprette*, *Newsom* is a Third Circuit case. Greenpath argues that the Trial Court's Judgment should be reversed because the Trial Court cited a Third Circuit case in its Judgment.⁷¹ But Greenpath has cited no authority disputing the rule explained by *Newsom* and relied upon by the Trial Court.

The Civil Code establishes only two sources of law in Louisiana: legislation and custom.⁷² Within these two categories, legislation is superior to custom and will supercede it in every instance.⁷³ Under the civilian tradition, while a single decision is not binding on our courts, when a series of decisions form a "constant stream of uniform and homogenous rulings having the same reasoning," *jurisprudence constante* applies and operates with "considerable persuasive authority."⁷⁴

The *Newsom* case cites a long line of decisions upon which it based its holding.⁷⁵ But there is no need to establish a custom or "*jurisprudence constante*" here. The statute itself controlled the Trial Court's decision. The statute provides:

No person, acting either for himself or as agent or otherwise shall require any of his employees to sign contracts by which the employees shall forfeit their wages if discharged before the contract is completed or if the employees resign their employment before the contract is completed; but in all such cases the employee shall be

⁷⁰ *Id.* at Record Doc. 110.

⁷¹ Appellant's Brief at p. 7.

⁷² La. Civ.Code art. 1; *Bergeron v. Richardson*, 2020-01409, p.7 (La. 6/30/21) 2021 WL 2679021.

⁷³ La. Civ.Code art. 3; *Bergeron v. Richardson*, 2020-01409, p.7 (La. 6/30/21) 2021 WL 2679021.

⁷⁴ *Bergeron v. Richardson*, 2020-01409, p.7 (La. 6/30/21) 2021 WL 2679021 (*citing James L. Dennis, Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 La. L.Rev. 1, 15 (1993)).

⁷⁵ *Newsom v. Glob. Data Sys., Inc.*, 2012-412 (La. App. 3 Cir. 12/12/12), 107 So. 3d 781, 787–88, *writ denied*, 2013-0429 (La. 4/5/13), 110 So. 3d 595.

entitled to the wages actually earned up to the time of their discharge or resignation.⁷⁶

Applying the explicit language of La. R.S. 23:634, as further explained in *Newsom*, the Trial Court was unpersuaded by Greenpath's efforts to offset the wages and pay it owed based on the contract.⁷⁷ The Court rejected Greenpath's argument that it was allowed to offset her wages with items that are not allowed by statute.⁷⁸ The Trial Court's Judgment was correct and should be affirmed.

D. Greenpath's Breach of Contract Argument Was Properly Dismissed

In its Appellant's Brief, Greenpath argues that they had the right to deduct the expenses from Ms. Gallo's paycheck because Ms. Gallo resigned her position prior to the end of her contractually required two-year term, thereby breaching her employment contract.⁷⁹ The essential elements of a breach of contract claim are: (1) the existence of a contract; (2) the party's breach thereof; and (3) resulting damages.⁸⁰ Greenpath had the opportunity to file a reconventional demand asserting a breach of contract claim and transfer the case to Civil District Court, but they did not.

When questioned at trial, Greenpath's Director, Mr. Ernest Airhia, did not provide any evidence of damages caused by Ms. Gallo's alleged breach beyond his own testimony.⁸¹ He stated, as follows:

Question: And you did not refuse to pay Ms. Gallo, did you? You didn't refuse to pay Ms. Gallo, did you?

⁷⁶ La. R.S. 23:634.

⁷⁷ Judge Ramsey's Judgment, Record Doc. 109-11.

⁷⁸ *Id.*

⁷⁹ Appellant's Brief at pp. 7-9.

⁸⁰ *Padian v. Algiers Charter Sch. Ass'n, Inc.*, 2019-0201 (La. App. 4 Cir. 6/19/19), 274 So. 3d 1266, 1268 (citing *110 South Jefferson Davis Parkway, LLC v. Williams*, 2014-1326, p. 5 (La. App. 4 Cir. 5/20/15), 165 So.3d 1211 (citations omitted)).

⁸¹ Trial Transcript at pp. 22 – 24, 27 – 28.

Mr. Airhia: Oh, no way. We paid her. I've been in business since 2004. I always pay everybody that comes in there, of course.

Question: We discussed it a little while ago. You testified it was in the amount of 118 and some change; correct?

Mr. Airhia: Absolutely. It was from ADP directly. I don't know what happened with the amount.

Question: Do you remember how you came up with that particular calculation?

Mr. Airhia: Yes, we – the calculation was very simple, that the two days, which was Monday and Tuesday (untintelligible) will not provide the services to the federal probation and parole because of the key. We didn't have the key because she went and post it from the post office. So we had to subtract those two days we couldn't provide no services and – subtract those two days of pay plus the Duluth model [training], that's how we come up with the whole amount.⁸²

.....

Question: Okay. And earlier you said that you lost a lot as a result of her leaving you guys without a replacement.

Dr. Airhia: Absolutely.

Question: And you said -- you gave us zero dollars specifically. So do you have any dollar amounts that you could testify to today about the losses you incurred?

Dr. Airhia: If I give you dollar amount, I might be misrepresenting you or representing myself. I --

Question: Well, I wouldn't want you to do that.

Dr. Airhia: I don't know exactly the dollar amount, but when she left us, we were like having a lot of problems emotionally, monetarily, and physically, yes.

Question: Did you lose any contracts as a direct result of Ms. Gallo's resignation?

Dr. Airhia: Well, the next contract is next month, which is on the 12th of next month. We don't know if we're gonna lose it. We don't know.⁸³

⁸² Trial Transcript, pp. 22-24

⁸³ Trial Transcript, at pp. 27-28.

Ms. Gallo disputed Greenpath's allegations.⁸⁴ Her testimony is as follows:

Question: And when you resigned you took the keys with you, didn't you?

Ms. Gallo: I did not take them with me. I had them because I was still employed. As an employee, I was still entitled to those keys. And when I was no longer an employee, they were dropped in the mail. Also, they didn't get there on a Wednesday; they got there on a Tuesday, which is verified by signature confirmation because I sent them overnight.

Question: But you still had the keys with you when you left on July 19 –

Ms. Gallo: Yes I did. Because I was still employed.

Question: You didn't leave the keys at Greenpath, did you?

Ms. Gallo: No, I did not. I took them every day when I left like all my co-workers.

Question: Did you understand that the keys you took with you were needed to access the probation office?

Ms. Gallo: No, I didn't because they're not the only set of keys for the door or for all the other doors in the building.

Question: You were aware of the very strict deadlines under which your job responsibilities were, correct?

.....

Ms. Gallo: There actually weren't any strict deadlines.⁸⁵

Greenpath failed to meet its prima facie claim of breach of contract and the Trial Court correctly dismissed Greenpath's breach of contract claim in finding for Ms. Gallo.

⁸⁴ Trial Transcript, at pp. 37-39.

⁸⁵ *Id.*

2. The Trial Court Did Not Err in Awarding Vacation Pay, Penalties, and Attorneys' Fees

A. Vacation Pay Award was Appropriate

Whether or not the Trial Court properly awarded vacation pay is a mixed question of fact and law subject to a manifest error standard.⁸⁶ In its Appellant's Brief, Greenpath argues that Ms. Gallo had not earned vacation pay at the time of her resignation, citing nothing in the record except Greenpath's own testimony in support.⁸⁷ The record shows that Ms. Gallo proved she was owed vacation pay under Greenpath's policy. Evidence presented in support included Greenpath's employee policy,⁸⁸ Ms. Gallo's testimony,⁸⁹ and a demand letter by Ms. Gallo's previous attorney to Greenpath calculating the wages owed.⁹⁰ Ms. Gallo's testimony was as follows:

Question: How much money -- what was your final paycheck? What should it have been?

Ms. Gallo: It should have been \$1,120 for wages and \$832.20 for the accrued vacation time.⁹¹

The law explicitly states that accrued and unused vacation pay qualifies as "wages" due upon an employee's resignation. La. R.S. 23:631(D)(1) provides:

For purposes of this Section, vacation pay will be considered an amount then due only if, in accordance with the stated vacation policy of the person employing such laborer or other employee, both of the following apply: (a) The laborer or other employee is deemed eligible for and has accrued the right to take vacation time with pay. (b) The laborer or other employee has not taken or been compensated for the vacation time as of the date of the discharge or resignation. (2) The provisions of this Subsection shall not be interpreted to allow the forfeiture of any vacation pay actually earned by an employee pursuant to the employer's policy.

⁸⁶ *Kaplon v. Rimkus Consulting Grp., Inc. of Louisiana*, 2009-1275 (La. App. 4 Cir. 4/28/10), 39 So. 3d 725, 733-34, writ denied *sub nom. Kaplon v. Rimkus Consulting Grp., Inc.*, 2010-1207 (La. 7/2/10), 39 So. 3d 587.

⁸⁷ Appellant's Brief at p. 9.

⁸⁸ Greenpath Employee Handbook, Record Docs. 106-107.

⁸⁹ Trial Transcript at p. 34.

⁹⁰ Attorney Whitney Wilson's October 9, 2019 Letter, Record Docs. 17-18.

⁹¹ Trial Transcript at p. 34.

Appellant has not shown how the Trial Court's award of vacation pay was a manifest error. The award is proper and should be affirmed.

B. Penalty Award was Appropriate

Appellant's Brief argues that penalties should not have been awarded because there "continues to be a bona fide dispute as to whether Ms. Gallo is owed any additional monies," again citing nothing but Greenpath's own self-serving testimony.⁹² There is no longer any bona fide dispute. Ms. Gallo's wage claim was litigated in open court to judgment. The trial judge wholly rejected Greenpath's efforts to avoid the statutory penalties.

A claimant seeking to recover penalties and/or attorneys' fees under La. R.S. 23:632 must establish the following three factors: (1) that wages were due and owing; (2) that demand for payment was made where the employee was customarily paid; and (3) that the employer did not pay upon demand.⁹³ Being penal in nature, La. R.S. 23:632 must be strictly construed, and its provisions yield to equitable defenses.⁹⁴ When a bona fide dispute exists over the amount of wages due, an employer's failure to pay is not an arbitrary refusal and no penalties will be awarded.⁹⁵ A trial court's determination of whether an employer is arbitrary or in bad faith for purposes of imposing penalty wages is a question of fact and is, therefore, subject to the manifest error standard of review.⁹⁶

Ms. Gallo met her burden of proving the essential elements required for a penalties award in this case. Greenpath has not pointed to anything in the record that

⁹² Appellant's Brief at p. 10.

⁹³ *Jeansonne v. Schmolke*, 2009-1467 (La. App. 4 Cir. 5/19/10), 40 So. 3d 347, 361 (citing *Becht v. Morgan Bldg. & Spas, Inc.*, 02-2047, p. 4 (La.4/23/03), 843 So.2d 1109, 1112).

⁹⁴ *Id.* (citing *Stall v. Professional Divers of New Orleans, Inc.*, 99-262, p. 7 (La. App. 5 Cir. 8/31/99), 739 So.2d 1005, 1009).

⁹⁵ *Id.*

⁹⁶ *Id.* (citing *Loup v. Louisiana State School for the Deaf*, 98-0329, p. 6 (La. App. 1 Cir. 2/19/99), 729 So.2d 689, 693).

would show there was a bona fide dispute or that the Trial Court committed manifest error in awarding penalties. The award is proper and should be affirmed.

C. Attorneys' Fees Award was Appropriate

Appellant's Brief argues that Ms. Gallo has not proven she is entitled to any unpaid wages and therefore should not be awarded attorneys' fees.⁹⁷ Unlike penalty wages, the jurisprudence has not recognized equitable defenses to the award of attorneys' fees in the event that a "well-founded suit" for wages is filed.⁹⁸ If the court makes any award of unpaid wages, the suit is considered "well-founded," even if some equitable defense precludes the award of penalty wages.⁹⁹ In the present suit, the Trial Court properly awarded Ms. Gallo damages for her well-founded wages suit. As such, an award of attorneys' fees was mandatory and the Trial Court's judgment should not be disturbed.

D. Additional Attorneys' Fees are Warranted

Since Judgment was rendered by the Trial Court, Ms. Gallo has incurred \$XXXX in additional attorneys' fees related to this suit.¹⁰⁰ Because the Trial Court's judgment should be affirmed, an additional award of attorneys' fees is reasonable in this suit.¹⁰¹ We thus request the Trial Court's Judgment be amended to award additional attorneys' fees in the amount of \$XXXX.

IX. RELIEF SOUGHT

Plaintiff/Appellee Ms. Mashanna Gallo requests this Court affirm the Judgment of the Trial Court and amend the Judgment to provide for an additional \$XXXX in attorneys' fees and costs.

⁹⁷ Appellant's Brief at pp.10-11.

⁹⁸ *Rodriguez v. Green*, 2012-0098 (La. App. 4 Cir. 6/20/12), 111 So. 3d 1, 5 (*citations omitted*).

⁹⁹ *Id.*

¹⁰⁰ Exhibit A, Affidavit of M. Suzanne Montero.

¹⁰¹ *See Kaplon v. Rimkus Consulting Group*, 2009-CA-127539, 39 So. 3d 725, 739 (La. App. 4 Cir. 2010).

