THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Ninth Judicial Circuit

Diane S. Goodstein, Circuit Court Judge

Case No. 2022-000077

The Shops at Westcott, LLC .....Respondent

v.

Sake House IV, Inc. d/b/a Sake House, and Lei Jiang .....Appellants.

FINAL BRIEF OF RESPONDENT

KOONTZ MLYNARCZYK BELGER, LLC

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COUNTER STATEMENT OF THE CASE

On August 22, 2019, The Shops at Wescott, LLC ("Shops at Wescott") brought an action for breach of contract and an action for personal guaranty against Appellants Lei Jiang ("Lei") and Sake House IV, Inc. ("Sake House"). (R. pp. 1-3; 12-18). Appellants filed their Answer and Counterclaim on May 30, 2019. (R. pp. 20-23). On June 5, 2019, Shops at Westcott filed its Reply to Appellants' Counterclaim. (R. pp. 24-25). Thereafter, on February 28, 2020, Shops at Westcott amended its Complaint to assert causes of action for breach of contract, negligence, and conversion. (R. pp. 26-31). Appellants filed their Amended Answer on March 30, 2020. (R. pp. 32-37). On August 3, 2021, a bench trial was held before the Dorchester County Court of Common Pleas. (R. p. 1). On October 11, 2021, the Dorchester County Court of Common Pleas found for Shops at Westcott, on all causes of action. (R. pp. 1-8). Subsequently, Appellants moved the Dorchester County Court of Common Pleas to Alter or Amend its October 11, 2021 Order, which was denied by Form 4 Order on December 21, 2021. (R. pp. 9-11; 139-141). This appeal followed.

COUNTER STATEMENT OF THE FACTS

On or about March 21, 2016, Lei acting as representative of Sake House, entered into a commercial lease agreement with Shops at Wescott so that Sake House could lease space to operate

a restaurant. (R. pp.1-8; 26-31; 47-51; 142-159). The lease was personally guaranteed by Lei, the space was rented at a rate $5,906.25 per month, and Sake House was further obligated to pay its proportionate share of taxes, insurance, and common area expenses, equaling an additional $1,082.81 per month, for a total of $6,989.06 dollars per month. (R. pp. 1-8; 27-32; 47-51; 142-159). Pursuant to the Lease Agreement, from April 1, 2016 until October 1, 2016, Appellants were afforded an opportunity to upfit the space into their desired restaurant. (R. pp. 50-51; 142-159). During this period, Appellants were not required to pay rent and no rent was paid. (R. pp. 2; 50-51; 142-159). Beginning on October 1, 2016 until September of 2017, Appellants made all rental payments pursuant to the terms of the Lease Agreement. (R. pp. 2; 89). In and around September of 2017, Sake House, by and through its representative, began requesting a rent reduction from the Shops at Westcott. (R. p. 62). In response, Shops at Westcott prepared a First Addendum to Lease Agreement ("Addendum"), which offered to reduce Appellants' rental payments to $5,000.00 from November 1, 2017 to April 30, 2018, after which time, the rent would increase to the rate set forth in the Lease Agreement. (R. pp. 2; 89; 160). Appellants did not execute the Addendum, yet, for the months between November 1, 2017 and April 30, 2018, Appellants paid only $5,000.00 dollars in rent each month. (R. pp. 2; 66). The following month, Appellants continued to only pay $5,000.00 of the of $6,989.06 in rent owed. (*Id*). Thereafter, on or about February 4, 2019, Shops at Westcott initiated eviction proceedings against Sake House. (R. p. 3). As a result of the eviction proceedings, Sake House was forced to vacate. (*Id*). While vacating their unit, Appellants caused substantial damage to the unit, the unit's fixtures, and removed equipment that belonged to Shops at Westcott. (R. p. 3). As a result of the damage caused by Appellants, Shops at Westcott was forced to expend $22,000.00 dollars to repair the unit and to purchase replacements for the equipment which was removed. (*Id*). As a result of the damage, and despite reasonable attempts

to re-let the unit, Shops at Westcott's unit remained unleased from March 2019 until January 2020. (*Id*). In order to offset some of its damages, Shops at Westcott retained Appellants' $5,000.00 dollar security deposit. (*Id*). Following a bench trial, Shops at Westcott obtained a judgement against Sake House for unpaid rent, late fees and attorneys' fees and costs pursuant to the lease terms. (R. pp. 4-5). In addition, the court found Lei, by virtue of his personal guaranty, was jointly and severely liable to Shops at Westcott for the amounts arising under the lease agreement, and that Appellants were jointly and severally liable to Respondent for negligence and conversion in the amount of $22,000.00 dollars. (R. p. 4). Thereafter, Appellants filed their Notice of Appeal on January 24, 2022. Although Shops at Westcott prevailed on each of its causes of action for breach of contract, negligence, and conversion, Appellants chose to only to appeal the judgments against them for breach of contract and conversion. (Appellants' Br. 1-7). Appellants did not appeal the judgment of negligence against them. (*Id*). Moreover, Appellants have not objected to the court's finding that they were liable to Shops at Wescott for breach of contract and conversion. Rather, Appellants only contest the amount of the award against them. (*Id*).

STANDARD OF REVIEW

On appeal from a case by a judge in an action at law, "the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *Alexander's Land Co. v. M & M & K Corp.*, 390 S.C. 582, 703 S.E.2d 207 (2011); *Auto Owners Ins. Co. v. Rollison*, 663 S.E.2d 484, 378 S.C. 600 (2008); *see also Moseley v. All Things Possible, Inc.*, 395 S.C. 492, 719 S.E.2d 656 (2011) (holding that a judge's finding of fact during a bench trial are the equivalent to a jury's findings in a law action). Actions for breach of contract and conversion are both actions at law. *Milliken & Co. v. Morin*, 399 S.C. 23, 731 S.E.2d 288 (2012); *Bateman v. Rouse*, 358 S.C. 667, 596 S.E.2d 386 (Ct. App. 2004). As both of Appellants'

issues on appeal concern actions at law, Appellants must show that there was not enough evidence to reasonably support the court's findings of fact. *Townes Associates, Ltd.*, 266 S.C. at 81, at 221 S.E.2d 773 (1976).

ARGUMENT

The findings of fact and conclusions of law within the Court of Common Pleas' October 11, 2021 Order were based on sufficient evidence that reasonably supported the judge's findings. There is more than ample evidence within the record to support the court's judgment against Appellants for breach of contract and conversion. As to breach of contract, Appellants do not contest their breach thereof, but merely whether there was enough evidence to support the award of damages arising from their breach thereof. The same can be said for Appellants' demur to the judgment of conversion entered against them. Appellants do not contest whether they converted Shops at Westcott's personal property, but whether there was sufficient evidence to sustain the amounts placed on their tortious conduct. As to both arguments on appeal, Appellants offer little authority to support their position.[1] In addition, Appellants failed to contest the portion of the judgment against them pertaining to negligence, thus barring any review of the same.

I. Appellants do not dispute that they breached the contract or converted Shops at Westcott's property.

"Failure to argue is an abandonment of the issue and precludes consideration on appeal." *Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993); Rules 207(b)(1)(B), (D), SCACR and 210(b), SCACR. *See also Howell v. Pacific Columbia Mills*, 291 S.C. 469, 354 S.E.2d 384 (1987)

[1] Between Appellants' first and second argument, Appellants cited but one case in support of their arguments. (Appellants' Br. 6-7). *See Transportation Ins. Co. & Flagstar Corp. v. S.C. Second Inj.Fund*, 389 S.C. 422, 432, 699 S.E.2d 687, 692 (2010) (holding that Respondent abandoned an issue on appeal by only making a half-page argument without any citations to authority); *Eaddy v. Smurfit–Stone Container Corp.,* 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.")

(under former rules). Appellants do not object to the court's finding that they were in breach of the Lease Agreement or whether they converted Shops at Westcott's property. (Appellants' Br. 6-7). Rather, Appellants dispute whether there is sufficient evidence to reasonably support the judge's finding that Shops at Westcott properly mitigated its contractual damages (Appellants' Br. 6.), and whether there is sufficient evidence to reasonably support the court's award of damages for conversion. (Appellants' Br. 7). Instead of disputing whether Appellants breached the lease agreement, Appellants argue that they "[s]hould not be adjudged to have total liability for breach of contract." (Appellants' Br. 6). Likewise, instead of disputing whether Appellants converted Respondent's property, Appellants argue that "[R]espondent failed entirely to prove the costs incurred." (Appellants' Br. 7).

"The unchallenged ruling, right or wrong, is the law of the case and requires affirmance." *Frampton v. S.C. Dep't of Natural Res.*, 432 S.C. 247, 851 S.E.2d 714 (2020) (internal quotations omitted) see also *Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997) ("It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling"). Here, it is an undisputed matter of law that Appellants are liable to Shops at Westcott for damages arising from their breach of the lease agreement and conversion of Shops at Westcott's property. Appellants failed to challenge those portions of the order, which have now become the law of the case. *Frampton*, 432 S.C. at 266, 851 S.E.2d at 733. All that remains are Appellants' challenges to the damages awarded to Shops at Westcott, for Shops at Westcott's causes of action for breach of contract and conversion. As Shops at Westcott will show, there is ample evidence in the record to uphold the entirety of the damages awarded to it.

II. The Court must affirm the judgment of the Court of Common Pleas because Appellants failed to appeal any portion of the judgment pertaining to negligence.

Where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case. *Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996) (*citing Biales*, 315 S.C. at 166, 432 S.E.2d at 482). *See also Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the [two-issue] rule, [when] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."). The two-issue rule can be applied to situations not involving a jury. *Walbeck v. I'On Co.*, 426 S.C. 494, 827 S.E.2d 348 (Ct. App. 2018).

As discussed in Argument I, *supra*, Appellants do not contest whether they breached the contract or converted Shops at Westcott's property. Likewise, Appellants have not challenged any portion of the order awarding damages to Shops at Westcott for Appellants' negligence. *Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (holding that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling). Here, the Court of Common Pleas found for Shops at Westcott on three separate grounds: breach of contract, negligence, and conversion. Appellants do not dispute whether they are liable to Shops at Westcott on all three grounds, especially as to negligence. Appellants did not challenge any part of the order finding them negligent and awarding damages to Shops at Westcott for their negligence. Here, Appellants' liability in negligence and the award of damages therefrom should be upheld as Appellants failed to challenge it. *Frampton*, 432 S.C. at 266, 851 S.E.2d at 733. Moreover, because Appellants failed to contest any portion of the judgment pertaining to negligence, and failed to contest whether they breached the contract or converted Shops at Westcott's property, this Court should affirm the entire judgment pursuant to the two-issue rule. *Walbeck*, 426 S.C. at 494, 827 S.E.2d at 348.

III. There is sufficient evidence within the record to reasonably support the judge's finding that Shops at Westcott mitigated its damages.

"A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances, but the law does not require him to exert himself unreasonably or incur substantial expense to avoid damages." *Lyons v. Fid. Nat'l Title Ins. Co.*, 415 S.C. 115, 781 S.E.2d 126 (Ct. App. 2015) (*quoting Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 285, 573 S.E.2d 830, 838 (Ct. App. 2002). The duty to mitigate losses applies to contracts. *Cisson Constr., Inc. v. Reynolds & Assocs.*, Inc., 311 S.C. 499, 503, 429 S.E.2d 847, 849 (Ct. App. 1993). Whether a party acted reasonably to mitigate their damages is for the trier of fact to determine. *Baril*, 352 S.C. at 285, 573 S.E.2d at 838. A defendant who claims a plaintiff's damages could have been mitigated has the burden of proving that mitigation is possible and reasonable. *Moore v. Moore*, 360 S.C. 241, 262, 599 S.E.2d 467, 478 (Ct. App. 2004). "Moreover, the party who claims damages should have been minimized has the burden of proving they could reasonably have been avoided or reduced." *Id.* (*quoting Chastain v. Owens Carolina, Inc.*, 310 S.C. 417, 420, 426 S.E.2d 834, 835 (Ct. App. 1993).

Here, the Court found that "[Shops at Westcott] attempted to re-lease the Property from March 2019 until January 2020…[Shops at Westcott] properly mitigated its damages through its attempt to re-lease the Property." (R. pp. 3-4). The Court of Common Pleas' conclusion reasonably reflects the evidence in the record. Brian Aiken, managing member of Shops at Westcott, testified as to Shops at Westcott's efforts to mitigate its damages. (R. pp. 82-84). Sake House caused substantial damage prior to its eviction from the unit. (R. pp. 82-84). So much so, the unit was unfit for viewing by potential tenants. (R. pp. 74-80). Mr. Aiken further testified that he brought potential tenants to view the unit. (R. pp. 74-80). Mr. Aiken marketed the vacancy to commercial brokers that specialize in restauranteurs. (R. p. 84). Shops at Westcott was ultimately successful

in finding a replacement tenant, however, Shops at Westcott had to perform substantial repairs to the unit just to make it presentable to prospective tenants. (R. p. 108). Mr. Aiken further testified that "[t]he marketing effort post-eviction was 100 percent. I wouldn't handle it any differently than I would any other space. You reach out to the brokerage community; you reach out to the web services, you know, which were members of different things, Multiple Listing Service would be one." (R. p. 111).

Here, Appellants have failed to meet their burden of proving that Shops at Westcott did not reasonably mitigate its damages. Appellants did not proffer any competent evidence that Shops at Wescott acted unreasonably to avoid or reduce its damages. The reasonableness of a party's actions to mitigate damages is a question of fact which cannot be decided as a matter of law when conflicting evidence is presented. *Chastain*, 310 S.C. at 420, 426 S.E.2d at 836. With the absence of conflicting evidence as to Shop at Westcott's mitigation efforts, the Court of Common Pleas properly found, as a matter of law, that Shops at Westcott properly mitigated its damages. The Court of Common Pleas' award of damages for breach of contract should be affirmed because the evidence presented and absence of conflicting evidence reasonably support the judge's findings.

IV. There is sufficient evidence within the record to reasonably support the judge's valuation of Appellants' conversion of Shops at Westcott's property.

The trier of fact's determination of damages is entitled to substantial deference and will not be disturbed on appeal unless it clearly appears the exercise of discretion was controlled by a manifest error of law." *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000); *Garrison v. Target Corp.*, 429 S.C. 324, 838 S.E.2d 18 (Ct. App. 2020) "'[W]here the amount of the verdict falls within the range of damages testified to, the verdict cannot be disturbed on the ground of excessiveness." *Singletary v. Shuler*, 433 S.C. 600, 861 S.E.2d 591 (Ct. App. 2021).

The Court of Common Pleas found that Appellants converted Shops at Westcott's personal property by wrongfully removing equipment from the unit. (R. p. 4). The court found Appellants jointly and severely liable to Shops at Westcott for negligence and conversion in the amount of $22,000.00. (R. p. 4). As discussed in Argument II, *supra*, Shops at Westcott's damages awarded in negligence must be affirmed as Appellants did not contest their liability of award of damages for the same.[2] Likewise, the issue of whether Appellants converted Shops at Westcott's personal property is unpreserved for review. *Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588. Irrespective of Shops at Westcott's damages in negligence, there is sufficient evidence in the record to reasonably support the judges' findings as to the award of damages for conversion. Pursuant to the terms of the lease, "[T]he property of Tenant may be removed upon the expirations of the term of this Lease, provided however that: 1. Any such items may be removed only if Tenant repairs any damage caused by such removal; 2. Tenant shall have fully performed…and no payments are due." (R. pp. 54-55; 142-159). Shops at Westcott had to replace several items wrongfully removed by Appellants. (R. pp. 74-76; 176). In particular, Shops at Westcott was forced to replace a bathroom stall door, replace the unit's electrical wiring, replace lighting fixtures removed from the ceiling, replace portions of the drop-in ceiling grid, replace the ceiling tiles, replace bathroom mirrors, replace water fixtures, and replace the HVAC system. (R. pp. 74-76). The five photographs depicting the damage to unit and items of personal property removed therefrom were admitted into evidence without objection. (R. pp. 76-78; 177). These photographs were taken the same day that Shops at Wescott regained possession and access to the unit. (*Id.*) The first picture admitted into evidence depicted the damage to the ladies' restroom which entailed the unauthorized removal of

[2] Appellants were contractually permitted to install an additional 5-ton HVAC unit, but were responsible for repairing any damages for the removal of the same. (R. pp. 53-54; 142-159).

the exhaust fan, lighting fixtures, and conduit; some of which hung bare from the ceiling. (R. pp. 74-76; 176). As a result of the damage to the restroom, Mr. Aiken testified as to the repairs Shops at Westcott had to make such as replacing a bathroom stall door, repairing and replacing electrical wiring, replacing lighting fixtures, repairing and replacing the drywall, replacing the restroom mirrors, replacing drop-in ceiling tiles, and replacing portions of the drop-in ceiling grid. (R. pp. 74-76). The second picture illustrated the damage to a portion of the bar installed prior to Appellants' occupancy. In addition to damaging the surrounding drywall, the bar was damaged beyond repair and had to be removed. (R. pp. 76-78; 177). Shops at Westcott's third photograph showed the damage to Shops at Westcott's walk-in cooler and freezer. In particular, Appellants disassembled both walk-in coolers, severed the coolers' electrical wiring, leaving them to dangle from the ceiling, and additionally, Appellants removed several drop-in ceiling tiles. (R. pp. 76; 176). Shops at Westcott's fourth photograph depicted further damage to the drop-in ceiling and removal of the HVAC air handler. (R. pp. 76-79; 178). Shops at Westcott's final photograph depicted the removal of the HVAC condenser, make-up air unit, and air handler. (R. pp. 79-80; 178).

In addition to illustrating the damage to Shops at Westcott's unit, Shops at Westcott introduced sufficient evidence to quantify the damage to Shops at Westcott's property. Shops at Westcott retained the services of Mr. Larry Bowman to repair the damage to the unit. (R. p. 80). Mr. Bowman has performed contracting and repair work on behalf of Shops at Westcott for approximately fifteen years. (R. p. 80). Mr. Bowman also performed the up-fit for Appellants prior to their possession of the unit. (R. p. 80). Sadly, Mr. Bowman passed away in June of 2021, the month before the trial of this matter. (R. p. 81). Shops at Westcott placed into evidence the checks

it wrote to Mr. Bowman for his contracting and repair services to the damaged unit.[3] (R. p. 81; 179). Appellants did not object to admission of the checks into evidence. (R. p. 82). Mr. Aiken, on behalf of Shops at Wescott, authenticated the checks and further testified that Shops at Wescott paid Mr. Bowman a total of $22,000.00 to replace and/or repair the damage Shops at Westcott's property. (R. p. 86). Shops at Wescott paid Mr. Bowman $10,000.00 to replace the HVAC system and make-up air unit from the walk-in cooler and freezer, $4,500.00 to repair the drop-in ceiling, and an additional $7,500.00 to restore other damaged portions of the unit. (R. pp. 107-110).

In an action at law tried by the court without a jury, the judge's findings of fact have the same force and effect as a verdict of a jury and will not be reversed upon appeal unless the court committed some error of law leading to an erroneous conclusion or unless the evidence is reasonably susceptible of the opposite conclusion only. *Townes Assoc., Ltd.*, 266 at 81, 221 S.E.2d at 773 (1976); *Midland Guardian Co. v. Thacker*, 280 S. C. 563, 314 S. E. 2d 26 (Ct. App. 1984). The judging of the credibility of witnesses and the weighing of evidence in a law case are uniquely functions of the trial court, not the appellate court. *Bivens v. Watkins*, 313 S.C. 228, 437 S.E.2d 132 (Ct. App. 1993). "[A] circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 3 (2016). Here, the evidence proffered by Shops at Wescott reasonably supported the Court of Common Pleas' award of damages for conversion. Pursuant to the terms of the lease, any fixtures or equipment left by a defaulting a defaulting tenant becomes property of the Landlord. (R. pp. 54-55; 142-159). As Appellants were found in default under the lease agreement, Appellants were not

[3] Mr. Aiken testified that over the course of his and Mr. Bowman's fifteen-year business relationship, Mr. Bowman never presented a formal invoice for his services, and that Mr. Aiken would pay the amount requested by Mr. Bowman. (R. p. 107). Mr. Aiken and Shops at Wescott trusted Mr. Bowman explicitly. (*Id*).

at liberty to remove them, as they had become property of the Shops at Westcott. (54-55; 142-159). Shops at Westcott produced photographs of the damage to the unit and property removed therefrom, the checks it wrote to the contractor to repair the unit, Mr. Aiken's testimony corroborating the damage to the unit, as well as the cost incurred to repair the same. For converted property, the measure of damages is the value of the property when converted plus interest to the date of trial. *Long v. Gibb's Auto Wrecking Co.*, 253 S.C. 370, 171 S. E. 2d 155 (1969). Based on Mr. Aiken's testimony and other demonstrative evidence entered into the record, and the absence of any conflicting testimony, the Court of Common Pleas reasonably and correctly found that Appellants were jointly and severally liable to Shops at Wescott in the amount of $22,000.00 for conversion and negligence. (R. p. 4). The Court of Common Pleas' award of damages in conversion should be affirmed as it was reasonably supported by the evidence presented.

CONCLUSION

For the argument set forth above, Respondent, The Shops at Westcott, LLC, respectfully requests this Court to affirm the Court of Common Pleas' Order dated October 11, 2021, award attorneys' fees and costs to Respondent for defending this action, and such other and further relief as this court deems just and proper.

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