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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2018-CP-26-00789

Roger D. Herrington II Respondent,

v.

Roger Dale Herrington and Eunice M. Herrington Petitioners,

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioners certifies that the Petition for Rehearing was made and then ruled on by the South Carolina Court of Appeals on October 5, 2022.

QUESTIONS PRESENTED FOR REVIEW

- I. DID THE SOUTH CAROLINA COURT OF APPEALS ERR IN REFUSING TO APPLY LACHES TO BAR THE RESPONDENT'S NEARLY DECADE OLD CLAIM?**

- II. DID THE SOUTH CAROLINA COURT OF APPEALS ERR IN REFUSING TO CONSIDER THE PETITIONERS' EVENTUARY OBJECTION AT TRIAL?**

STATEMENT OF THE CASE

In 1988, Roger Dale Herrington, I (“Dale”) started a land clearing and septic tank business (hereinafter referred to as the “business”). (Trial Transcript, p. 117, ll. 15-18; R. p. 137). Dale began only installing septic tanks for homes and commercial properties, and then he grew the business to include land clearing and hauling dirt. (Id.) Dale acquired several large pieces of equipment to conduct his business. (Trial Transcript, p. 118, ll. 13-17; R. p. 138).

The Respondent is Dale’s son, and he began working for Dale well after the business was established. (Trial Transcript, p. 120, ll. 8-p. 121, l. 4; R. p. 140-141). Around 1995, the Respondent began working for his father full time and he claims that his father immediately offered to give him the business if he worked there for ten years or until 2005 or 2006. (Trial Transcript, p. 59, l. 24-p. 60, l. 11; R. p. 79-80). Beginning in 2006, according to the Respondent, he would own the business and pay the Petitioners \$500 a week. (Id. at p. 65, ll. 16-23; R. p. 85).

Starting in 1995 until he left in 2012, the Respondent received a paycheck. (Id. at p. 66, ll. 7-14; R. p. 86). The Respondent initially received \$500 a week in pay, which was an increase to the amount he made in his former job, and that amount increased to \$800 a week during his employment with the business. (Id. at p. 69, ll. 5-13; R. p. 89). Despite this alleged verbal agreement, the years 2005 and 2006 passed and the business was not transferred to the Respondent. (Id. at p. 71, ll. 4-12; R. p. 91). The Respondent admitted he was paid a good salary while he worked for his father. (Id. at p. 91, ll. 19-21; R. p. 111).

The Respondent began having violent episodes at work, and he inevitably left to begin a competing business. (Trial Transcript, p. 127, l. 6-p. 128, l. 13; R. p. 147-148 and p. 138, l. 12-p. 139, l. 2; R. p. 158-159). In 2015, almost ten years after the alleged agreement would have been

breached, the Petitioners sold the business to their son, Keith Herrington. (Id. at p. 131, ll. 23-25; R. p. 151).

On February 18, 2015, the Respondent commenced this action against the Petitioners. The Respondent raised claims for breach of contract, unjust enrichment, quantum meruit and breach of contract accompanied by fraudulent act. The Petitioners answered and raised several defenses including statute of frauds, statute of limitations, laches and other equitable defenses. The case was stricken from the docket pursuant to Rule 40(j), SCRCF, and on February 6, 2018, it was restored to the active docket under the current 2018 case number.

A jury trial began on November 18, 2019. During the trial the Respondent submitted an equipment list with values that he testified he obtained from the “John Deere place” and the “Chevrolet Place.” (Trial Transcript, p. 76, l. 18-p. 78, l. 17; R. p. 96-98). The Respondent offered the evidence to support his damages claim. The Petitioners objected to the admission of the evidence as hearsay, but the Trial Court overruled the objection on the basis that the Respondent can testify as to values of the property. (Id.)

The jury returned a verdict in favor of the Respondent on the unjust enrichment claim in the amount of \$170,005.00, which is almost certainly based on the equipment values that the Trial Court allowed into evidence.¹ The Petitioners timely filed post-trial motions, which were denied, and this appeal followed.

On July 6, 2022, the South Carolina Court of Appeals issued an unpublished opinion affirming the Trial Court. On July 20, 2022, the Petitioners filed a Petition for Rehearing, and on

¹ Only the unjust enrichment claim went to the jury.

October 5, 2022, the South Carolina Court of Appeals withdrew and replaced its first unpublished opinion with one that added a footnote addressing the Petitioners' prejudice argument on laches.

I. THE PETITIONERS DEMONSTRATED UNREASONABLE DELAY AND PREJUDICE TO SUPPORT THEIR LACHES DEFENSE OF THE NEARLY DECADE OLD CLAIM.

The equitable doctrine of laches is "the neglect for an unreasonable length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Robinson v. Estate of Harris, 391 S.C. 114, 118, 705 S.E.2d 41, 43 (2011). To establish laches, a defendant must show: (1) delay, (2) unreasonable delay, and (3) prejudice. Hallums v. Hallums, 296 S.C. 195, 199, 371 S.E.2d 525, 528 (1988). The South Carolina Court of Appeals ("Court of Appeals") held that the Petitioners failed to demonstrate unreasonable delay and prejudice.

1. Unreasonable Delay

The Respondent alleges in 1995 or 1996 that his father verbally agreed to sell him the business in ten years. Ten years expired in 2005 or 2006 with no sale, and at that point the Respondent was on notice that the alleged contract had been breached. Despite this notice, the Respondent continued to work for his father for another seven years before he quit. Nothing prevented the Respondent from filing an action after the performance date passed. Nearly a decade passed from the time that the Respondent knew he had a claim against the Petitioners and the time he brought this action.

The Court of Appeals held unreasonable delay did not apply based on the Respondent's claim that Eunice asked the Respondent to keep the business in her name for some indefinite period. However, the Respondent did not assert a claim for constructive or resulting trust. In

addition, laches applies when the plaintiff is not diligent or is negligent in failing to assert or preserve a claim. Arceneaux v. Arrington, 284 S.C. 500, 503-04, 327 S.E.2d 357, 359 (Ct. App. 1985); *see also* Mid-State Tr., II v. Wright, 323 S.C. 303, 307, 474 S.E.2d 421, 423 (1996)(citing Arceneaux v. Arrington for the principle that a plaintiff must exercise diligence in pursuing a claim).

The Respondent, knowing that the time for performance of the alleged agreement had expired, did nothing to secure his agreement, such as ask for an extension in writing. Rather, he relied on an indefinite verbal promise. Reliance on an ambiguous verbal promise is unreasonable. A&P Enters, LLC v. SP Grocery of Lynchburg, LLC, 422 S.C. 579, 589-90, 812 S.E.2d 759, 764 (Ct. App. 2018). The Respondent's alleged reliance on Eunice's promise was unreasonable and insufficient to toll his time to assert a claim. The Respondent's delay in filing his claim was unreasonable.

2. Prejudice

The Petitioners demonstrated prejudice through the reasoned belief that a thirteen-year passage of time between the alleged breach of an agreement and trial will distort the memories of witnesses and render some key witnesses unable to appear and testify. A key witness for the Petitioners, Archie Mack, who witnessed material events of the dispute between the parties died before trial. (Trial Transcript, p. 130, ll. 11-21; R. p. 150)

In addition, the long period of time made defending the issue of whether the Respondent conferred a benefit on the Petitioners nearly impossible. In Hallums v. Hallums, a mother claimed retroactive child support sixteen years after her claim for support accrued. 296 S.C. at

198-199, 371 S.E.2d at 528. The South Carolina Supreme Court held that the mother's delay led to a speculative award of damages and an award against a father whose circumstances changed since the time the claim accrued. Id.

Similarly, in this case, the Petitioners were unable to go back nearly 25 years to gather evidence to prove that the Respondent's participation in the business conferred no benefit in addition to the salary he was paid. To demonstrate the jury's confusion and impossible task, it awarded damages apparently based on the value of equipment that the Petitioners owned in 2012. The Respondent did not purchase this equipment, and the equipment had no correlation to an alleged benefit provided by the Respondent. (Trial Transcript, p. 76, ll. 11-17; R. p. 96 and p. 118, l 12-p. 119, l. 10; R. p. 138-139). This measure of damages to quantify the alleged benefit was speculative and was caused by the long passage of time.

Moreover, detrimental reliance on a delay in asserting a claim against property when that delay results in the defendant selling at a certain price in anticipation of a certain profit is evidence of prejudice. Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 432-33, 673 S.E.2d 448, 456 (2009). The Petitioners sold the business in 2015, almost ten years after the expiration of the alleged agreement with the Respondent. The Petitioners only received the promise of weekly payments as consideration for the sale.

They sold the business reasonably believing that they owned it and did not receive any type of lump sum cash payment for the equipment. (Trial Transcript, p. 190, ll. 5-11; R. p. 210). The Petitioners' circumstances changed significantly since the time that the Respondent's claim accrued, and they reasonably relied on the ten-year delay as evidence that the Respondent could not prevail on a claim against the business when the Petitioners decided the terms of the sale.

The Petitioners were prejudiced by the Respondent's unreasonable delay in bringing this action. Consequently, the doctrine of laches bars the Respondent's unjust enrichment claim.

II. THE PETITIONER PRESERVED ERROR BY OBJECTING AT TRIAL AND RECEIVING A DECISION BY THE TRIAL COURT.

The Respondent submitted a list of equipment which included the alleged value of the equipment in 2012 and testimony of the value. The purpose of the evidence was to demonstrate the value of the business in 2013 and the value of benefit the Respondent conferred to the Petitioners. However, the Respondent admitted that he did not arrive at the values himself. He obtained them from a John Deere place and Chevrolet place. This source was undisclosed, and the equipment value must have been the measure of damages used by the jury for its award.

Counsel for the Petitioners objected to the admission of the evidence as hearsay, and the Trial Court overruled the objection stating, "He can testify as to what he thinks the values are, but he can't testify as to what somebody else told him." (Trial Transcript at p. 77, l. 2- p. 78, l. 5; R. p. 97-98). The Trial Court did not cite a specific rule, but the Petitioners can reasonably presume the Trial Court's decision was based on the rule allowing an owner to testify as to the value of his or her property.

Ordinarily, a lay witness may not offer expert testimony. Rule 701, SCRE. An exception allows an owner to testify to the value of damaged personal property. Waites v. S.C. Windstorm & Hail Underwriting Asso., 279 S.C. 362, 366, 307 S.E.2d 223, 225 (1983). The Court allowed the Respondent to testify as to the value of commercial equipment he did not own. Also, the Respondent testified that he obtained the values from a John Deere and Chevrolet place. This testimony and documentary evidence were well beyond the exception described above. The

Trial Court erred in admitting the evidence. The admission of the evidence prejudiced the Petitioners.


The South Carolina Court of Appeals refused to consider the issue stating that the Petitioners objected as hearsay but argued the issue based on impermissible lay expert testimony. The objective of issue preservation is to ensure that the lower court is afforded the opportunity to hear, consider, and decide an issue before it is raised on appeal. Winkler v. State, 418 S.C. 643, 662, 795 S.E.2d 686, 696-97 (2016).

The evidence was hearsay. This point was not in dispute and the Trial Court did not rule it was not hearsay. Rather, the Trial Court allowed the evidence based on the exception cited above. This issue was heard, considered, and decided by the Trial Court, and this issue was not raised for the first time on appeal. The Petitioners respectfully submit that the Court of Appeals erred in failing to consider the evidentiary issue.

CONCLUSION

The doctrine of laches barred the Respondent's unjust enrichment claim. The Petitioners request that the Court enter judgment for them. In addition, the Trial Court improperly admitted the evidence of the equipment value. Therefore, in the alternative, the Petitioners request that the Court order a new trial excluding the improper evidence.

November 2, 2022



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Roger Dale Herrington and Eunice M. Herrington Appellants,

PROOF OF SERVICE


I certify that on November 2, 2022, I served the Petition for Writ of Certiorari on the Respondent, through his attorney of record and the South Carolina Court of Appeals, by depositing a copy of same in the United States Mail, postage prepaid, to:

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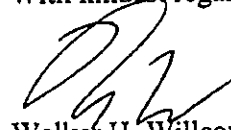
Re: Roger Herrington, II v. Roger Dale Herrington
Appellate Case No: 2020-000267
Our File No: 16079.16663

Dear Ms. Howard:

Kindly find enclosed the original Petition for Writ of Certiorari, Proof of Service, two copies of the Appendix (one bound and one unbound), Proof of Service, and copies in connection with the above appeal.

Should you have any questions or concerns, please contact me at (843) 662-3258.

With kindest regards,

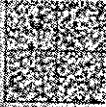


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Enclosures

Cc: George E. Graham, Esq.
Honorable Jenny Abbott Kitchens (*Petition for Writ of Certiorari Only*)

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