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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY

Teasa K. Weaver, Master in Equity

Appellate Case No. 2020-001023

Mark Giles Pafford,

Appellant,

v.

Robert Wayne Duncan, Jr.,
Robert Duncan, Sr., and Frank Eason,
d/b/a "Rock City Heavy Hauling, Inc."
of whom
Robert Wayne Duncan, Jr. and
Robert Duncan, Sr. are the

Respondents.

RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Appellant was an independent contractor for Rock City Heavy Hauling, Inc. The Respondents are the owners of Rock City Heavy Hauling, Inc.

The Appellant and Respondent Duncan, Jr. entered into an agreement for the purchase of a used 2003 Kenworth W 3900 truck, a 1998 Trailking trailer, 2009 Trailking trailer (hereinafter referred to as "vehicles") and a clip axle for $95,000.00. Appellant also worked for Respondent for a period of time.

The Appellant and Respondent also entered into a subsequent agreement for Respondent to purchase a Thunderbird automobile for $14,000.00 the amount to be deducted from the balance owed to Appellant. The Appellant took possession of this vehicle but subsequently decided he did not want the vehicle and had it dropped off at the Respondents business, unbeknownst to the Respondent. This vehicle was ultimately sold by the Respondents to a third party for $8,000.00.

After a hearing without a jury, the Court found that both parties acknowledged that funds had been paid to the Appellant by the Respondent. The Court further found that the parties did not disagree as to the amount of monies that had been paid but rather disagreed as to how the money was to be applied, as well as whether Appellant's weekly earnings had increased four months into his employment. The Court ultimately found that the Appellant earned wages of $91,000.00. The Court also found that the Respondents owed to the Appellant the sum of $11,067.52 for expenses. The Court further found that the Respondent owed to the Appellant $95,000.00 for the vehicles.

The Court also found that the Respondent had paid to the Appellants the total of $163,000.00 towards wages and vehicles/equipment. The Court ultimately found that after damages and offsets, the Appellant was liable to the Respondent in the amount of $33,568.09 and a separate $4,195,00 to Respondent Duncan, Sr. Additionally, Appellant was ordered to transfer the title of the 2003 Kenworth and the 1998 TrailKing trailer. Respondents were required to return the 2009 TrailKing Trailer to Appellant.

Appellant filed a Motion for New Trial, Altering or Amending Judgment pursuant to Rule 59, SCRCP. This motion was denied. On October 19, 2022, the Court of Appeals affirmed the Order of the Circuit Court which found in favor of the Respondents. A Petition for Rehearing was filed by the Appellant on November 3, 2022. This Petition was denied by Order of the Court of Appeals on December 22, 2022.

This Appellant filed for a Writ of Certiorari on January 23, 2023.

ARGUMENTS

1. THE FACTS PRESENTED PROVE FRAUD ON THE PART OF THE APPELLANT AS TO THE VEHICLE CONTRACT.

South Carolina Appellate Court Rule 214(d) sets forth specific requirements that the petition for the writ of certiorari shall contain in order to be eligible for consideration. Rule 214((d)(4) specifically requires that the petition "shall include citation of authority". The Appellant contends, in their Writ, "that the conclusions and findings of the Circuit Court are in violation of legal precedent and without factual bases. The Appellant goes into great depth in discussing the same facts with this Court as it did at the trial of this matter and to the Appellate Court. The Appellant fails to set forth any authority that supports his contention that the findings of the Circuit Court, and affirmed by the Appellate Court are in violation of any legal precedent. The Respondent does not believe that there has been any violation of legal precedent and furthermore, it is the obligation of the Appellant in his Writ to provide the relevant legal precedent that has been violated. The Appellant has failed to do this. Therefore, this Court should disregard the Appellant's petition on this alleged error.

However, in the event that this Court determines that the Appellant's argument has merit, this Court must look to the standard of appellate review applicable to this matter to determine error. The master-in-equity is the fact finder in non-jury cases. *Smith v. Barr*, 375 S.C. 157, 162, 650 S.E.2d 486, 489 (Ct. App. 2007). Appellate Courts will uphold a master's factual findings if there is <u>any</u> evidence to support the decision. "*Gooldy v. Storage Ctr.-Platt Springs, LLC*, 422 S.C. 332, 338, 811 S.E.2d 779, 782 (2018)"

The Appellant testified that he had reported one of the trailers stolen but could not remember whether or not he had ever been paid for the trailer from the insurance company. (R. p. 912, lines 15-22, p. 916, lines 1-12,p. 916, line 25, pp. 917 -920). Appellant later testified as

he later testified that he had brought the trailer to the Flying J. to avoid repossession. (R. p. 912, lines 15-22, p. 916, ll. 1-24 R. p. 916, line 25, pp. 917 -920). In regard to being questioned about whether the vehicle he reported stolen was the same vehicle he sold to Respondents; Appellant responded, "I'm not saying anything". (R. p. 917, lines 19-22). The Appellant then testified that the trailer that was sold to the Respondents came from a "yard down in Chester County". (R. p. 918, lines. 3-6). When asked how he acquired it, he testified that "it just showed up" at the yard (R. p. 918, lines 7-20). After further questioning regarding this matter, Appellant's testimony changes. He later testifies that the trailer that was in the yard down in Chester County was the stolen trailer and is the same trailer that he sold. (R. p. 919, lines 20-25; p. 920, lines 1-3). Furthermore, Appellant never reported to the authorities that he had in fact recovered the stolen trailer. (R. p. 920, lines 4-6). Appellant's testimony was inconsistent, did not comply with the evidence and as a result the master-in-equity did not find his testimony credible.

The Appellant, in his Writ, is attempting to focus all of this Court's attention on documents and testimony that was or was not provided. However, the Appellant is failing to acknowledge his own inconsistent testimony. The lower court found the Appellant not to be credible. After setting forth his argument regarding the testimony and evidence presented, the Appellant then jumps to the conclusion that there was no evidence that supported the lower court's finding, ignoring his own testimony and also argues that the testimony should have been excluded, but fails to set forth on what grounds this testimony should be excluded. Additionally, the Appellant argues that the Respondent sustained no damages as a result of the problems with this title, however, this is simply untrue. There is no disagreement that the Respondent paid to the Appellant $95,000.00 part of which was for the trailers. Without the title, the Respondent could not prove ownership or exercise any rights of ownership on the trailer. In regard to the

statute of limitations argument, the Appellant was alleging that the Respondent was making a claim to the trailer based upon language in the pleadings. (R. pp. 985-987) At trial, it was argued that the Respondent was not in fact making a claim for the trailer but was explaining the circumstances based upon the Appellant's questioning. (R. p 987). Additionally, the issue, in this case, was not when the title was transferred to the insurance company, but rather that Appellant sold a trailer that he was not the legal owner and did not have the authority to sell.

The Appellate Court went through the evidence that was considered in upholding the finding of fraud against Appellant and there was no error of law finding.

2. THE CLAIM OF FRAUD IS NOT PRECLUDED BY WAIVER OR ESTOPPEL.

The Respondent would reiterate that it is well-settled that an issue cannot be raised for the first time on appeal but must have been raised to **and** ruled upon by the trial court to be preserved for appellate review. *Staubes v. City of Folly Beach*, 529, S.E.2d 543, 339 S.C. 406 (S.C. 2000) (**emphasis added**). This requirement is intended " 'to enable the lower court to rule properly after it has considered all relevant facts, laws and arguments'." *Id.* 339 S.C. at 412 citing, *I'On v Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000). "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error. *Id.* 339 S.C. at 412.

The Appellant, without using "waiver" or "estoppel" language affirmatively alleges in his reply that the Respondent was fully aware of the status of the subject truck. (R. p. 289-295). This is set forth in the record, however, the Appellant failed to utilize or argue this affirmative defense at the trial of this matter. Appellant's reliance on the *Plyler v. Burns*, 647 S.E.2d 188, 373 S.C 637 (S/C/ 2007 is misplaced. In *Plyler*, Plyler argued that the trial court erred in considering the Defendant's motion to dismiss because they waived their right to assert common

law judicial immunity. This was due to the fact that the Defendant did not include the defense in the motion to dismiss but only in the memorandum in support of the motion to dismiss. The motion and the memorandum were submitted to opposing counsel prior to the hearing on the matter and ultimately were considered by the lower court. *Id.* at 194. The Court further opined that "many courts allow the assertion of affirmative defenses despite a technical failure to comply with the initial pleading requirements where the defense is timely raised to the trial court...". *Id* The Plyler court also looked to another case in support of their decision. In *Wright v. Sparrow*, 298 S.C. 469. 470, 381 S.E. 2d 503 (Ct. App. 1989) the court held that a court can properly consider the arguments presented in the summary judgment motion and supporting memorandum despite the defendant's failure to include the specific grounds in the notice. Once again, the Court properly heard the motion and ruled on that motion.

In the case before this Court, the Appellant raised in his reply that the Defendant was fully aware of the status of the truck. (R. p. 289-295). This was the only time this affirmative defense was raised. The Appellant did not argue the matter at trial which would allow the lower court to rule. Simply alleging an affirmative defense, without ever bringing up the defense again would lead to an absurd result and would allow attorneys in this State to plead every affirmative defense but never have to bring the matter to the court's attention for a ruling. The appellate courts would then be tasked with determining, for the first time, whether a defense was applicable and would change the outcome of the underlying case. This was not the intent of Rule 8, SCRCP.

Simply raising a timely defense is not sufficient. As stated in *Staubes*, it must be ruled upon to be preserved for appellate review. *Id.* The Appellant failed to raise the alleged defense

in this matter and thus it prohibited the lower court from ruling on it. The Appellate Court did not err in affirming the decision of the lower court.

3. THE EVIDENCE PRESENTED DOES NOT ALLOW THE APPELLANT TO A CLAIM OF UNPAID WAGES

The Appellant is alleging that he established a *prima facie* case in regard to the unpaid wages and thus the burden then shifted to the Respondent to disprove the accuracy of the account. This is merely a conclusory statement made by the Appellant and is not supported by the facts or record in this matter. Thus, the burden never shifted to the Respondent.

The Appellant contends that there is contradictory evidence on behalf of the Respondent in submitting his affidavit stating the purchase price of the truck was $85,000.00 (R. p. 142). Respondent later testified that the entire transaction was for $95,000.00 with $85,000.00 representing the portion for the truck and $10,000.00 representing the cost of the accessories. (R. p. 896, ll. 15-20). This clearly demonstrates that there is no contradictory evidence as stated by the Appellant.

Both parties testified as to the amount of the Appellant's weekly payments. Respondent testified it was always $1,000.00 per week and the Appellant testified that they were increased to $1,500.00 per week. (R. p. 902, ll. 14-16, p. 903., ll. 16-25) In determining the credibility and weight of evidence, this is exclusively for the master-in-equity. *Singletary v. Shuler*, 433 S.C. 600, 607, 861 S.E.2d 591, 595 (Ct. App. 2021).

The Appellant is incorrect in stating that there is an uncontested number of employment weeks. It was not until this appeal that 115 weeks was proposed by the Appellant. During the trial, the Appellant agreed that there were only 94 weeks that he was owed. (R. p. 909, ll. 4-12). The lower court's math is not incorrect; thus the findings and conclusions are also proper.

4. THERE IS CREDIBLE EVIDENCE TO ESTABLISH THE WORTH OF THE RETURNED THUNDERBIRD.

Prior to this appeal, Appellant never objected to the value of the Thunderbird being $14,000.00 In fact, based upon Appellant's actions in purchasing the Thunderbird and agreeing to use it to offset funds the Respondent owed Appellant, not only can be inferred that he agreed to the value, but he also testified to the agreement regarding the offset of $14,000.00 when he returned the vehicle. (T. p. 34, ll. 10-12, p. 105, ll. 21-23, p. 928 ll. 4-25, p. 930, ll. 1-24).

It is misleading for the Appellant to contend that there was no proof as to the true value of the vehicle when the parties agreed upon the sale of the vehicle as well as at trial the value.

In the Appellant's Writ, he states for the $14,000.00 value to be considered by the master-in-equity, there must be no contest on his part as to value. The Respondent agrees with this contention that there was no contest on anyone's part in regard to the value as supported by the testimony of both parties. Thus, the Writ of Certiorari in regard to this issue should be denied.

5. THERE IS CREDIBLE EVIDENCE OF THE DAMAGES FROM APPELLANT'S ATTEMPT AT REPOSSESSION.

In Appellant's Writ, he alleges that the Respondent's failed to produce evidence. At trial, evidence was presented in the form of testimony and exhibits regarding entry by Appellant onto the Respondent's property to repossess the truck and the resulting damage. (R. p. 892, lines 15-20, p. 930, lines 3-17, p. 931, lines 18-25). "Appellate courts will uphold a master's factual findings if there is any evidence to support the decision". *Storage Ctr.-Platt Springs*, 422 S.C. at 338, 811 S.E.2d at 782. The lower court examined the evidence that was presented at the trial and made a sound judgment based upon that evidence. The Appellant is

desirous of having this Court focus on the evidence that was not provided which is simply illogical. As a result, this Court should deny a writ of certiorari in regard to this issue.

CONCLUSION

There is ample evidence that Appellant engaged in fraud and misrepresentation in regard to the trucks and trailer. The defenses of waiver and estoppel were never ruled upon by the lower court and thus they cannot be raised for the first time in this appeal. In regard to the wages, the a *prima facie* case was never proven, thus the burden never transferred to the Respondent. It is proper for Appellate Courts to uphold a master's factual findings if there is any evidence to support the decision. There has been substantial evidence regarding each of the Appellant's issues in his Writ to deny the petition.

Based upon the aforementioned arguments, the Respondents seek an Order of this Court denying the Appellant's Writ of Certiorari in its entirety.

Respectfully submitted,

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