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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge
Joseph M. Strickland, Master-in-Equity
Casey L. Manning, Circuit Court Judge
Robert E. Hood, Circuit Court Judge

Appellate Case No. 2023-001996
Case No. 2018-CP-23-005208

Best Choice Roofing & Home Improvement, Inc., ...Appellant,

v.

Tyler Woods,...Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

Appellant (BCR Inc.) respectfully submits this Reply Brief in response to the Respondent's (Woods') Brief of Respondent.

I. The master's award of $420,000.00 in lost wages includes an impermissible double recovery that requires a reformation or remand of the actual damages award as well as the punitive damages award attributable to the lost wages award.

"It is a fundamental rule of law in this state that there can be no double recovery for a single wrong." *Inman v. Imperial Chrysler-Plymouth, Inc.*, 397 S.E.2d 774, 776 (S.C. App. 1990). This rule is so fundamental that it may be raised at any time. *Id.* at 777. The master violated this fundamental rule in his award of lost wages to Woods.[1]

The master awarded Woods six years of lost wages at $70,000.00 per year for a total of $420,000.00 based on his findings of what Woods would have earned at Premiere Roofing absent BCR's alleged interference with the employment contract between Woods and Premiere Roofing. (Damages Order at 8, 9). The master calculated punitive damages by using a 10-to-1 ratio and, therefore, $4.2 Million Dollars of the $4.34 Million Dollars award is attributable to the lost wages award of $420,000.00. (*Id*. at 13-14).[2]

The uncontested evidence shows (and the master found) that, after BCR's alleged interference with Woods' employment contract with Premiere Roofing, Woods continued to have the ability to earn $35,000.00 to $40,000.00 per year in non-roofing income.

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[1] In *Inman*, this Court addressed a specific "double recovery" scenario involving an election of remedies, but the "fundamental rule of law" against "double recovery" is not limited to this scenario. See, *e.g.*, *Moore v. Moore*, 779 S.E.2d 533, 542 (S.C. 2015) (family court case noting that an impermissible double recovery would result if future earnings were used in determining equitable division and then also used in awarding alimony).

[2] The master also awarded $1,400.00 in actual damages for medical expenses, which accounts for the remaining $14,000.00 in punitive damages (1,400 x 10 = 14,000). (Damages Order at 9, 13-14).

(Damages Order. at 9). The master's award of $70,000.00 per year in lost wages, therefore, includes a double recovery of $35,000.00 to $40,000.00 per year, a total of $210,000.00 to $240,000.00 for six years of lost wages. Accordingly, the judgment must be reduced by an amount within this range or remanded for redetermination. Because the master used a 10-to-1 ratio to award punitive damages, that award must similarly be reduced by $2.1 Million Dollars to $2.4 Million Dollars or remanded for redetermination. *Solley v. Navy Fed. Credit Union, Inc.*, 723 S.E.2d 597, 608 (S.C. App. 2012) (when court remands actual damages for redetermination, must also remand punitive damages for redetermination in light of new actual damages award).

II. The master erred in awarding punitive damages for intentional interference with a contract, because Woods failed to present any clear and convincing evidence that BCR Inc. acted with a conscious disregard of Woods' rights in sending the cease and desist letter to Premiere Roofing.

Punitive damages is a remedy. *Portrait Homes – S.C., LLC v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 900 S.E.2d 245, 277 (S.C. App. 2023) (remedy not limited to actual damages if plaintiff also proves defendant's actions were willful). Judge Manning granted summary judgment to Woods on liability for his counterclaims but referred the question of "any remedy sought by [Woods]" to the master. (Order of Reference; Summary Judgment Order). Thus, it was incumbent upon Woods to submit *clear and convincing* evidence to the master that he was entitled to an award of punitive damages. *Id.* at 278. He did not.

The complaint alleged that Woods violated a covenant not to compete by working for a competitor (Premiere Roofing) that was within 100 miles of a BCR location. (Cmplnt. at 1-2, ¶¶ 3-4). Woods' counterclaimed for intentional interference with a business relationship, *i.e.*, interference with the employment contract between Woods and Premiere Roofing. This counterclaim hinged on the following allegations:

1. Woods began working for BCR in Marietta, Georgia on April 17, 2017. (Answ. at 5, ¶ 30).

2. Woods left BCR on April 29, 2017. (*Id.* at 6, ¶ 42).

3. Several weeks later, Woods began working for Premiere Roofing in Irmo, South Carolina. (*Id.* at 7, ¶ 45).

4. On November 30, 2017, BCR sent a "cease and desist" letter to Premiere Roofing, alleging that Woods' employment with Premiere violated the covenant not to compete, and Premiere Roofing terminated its agreement with Woods based on this letter. (*Id.* at ¶¶ 47-48).

Thus, the cease and desist letter is the only alleged "interference" by BCR, Inc. It was therefore incumbent upon Woods to submit clear and convincing evidence to the master that the act of sending this letter was willful, wanton, or in reckless disregard of and a conscious invasion of Woods' rights. *Portrait Homes,* 900 S.E.2d at 278. He did not.[3]

This Court applies an "any evidence" standard to the question of whether Woods sufficiently proved an entitlement to an award of punitive damages by clear and convincing evidence. The master found that BCR Inc. "was aware *at the time it sent the cease-and-desist letter* to Premiere Roofing that [Woods] was not in violation of his employment contract." (Damages Order at __) (emphasis added). Woods did not submit any evidence (clear and convincing or otherwise) of this. (See Damages Hrg. Tr. and Damages Hrg. Exhs. at R. ___-___ and ___-___, all *passim*). Moreover, the letter came from a law firm, not BCR Inc., and even the negligent, unilateral entrustment of responsibility for a matter to a law firm is insufficient to survive appellate review of whether clear and convincing

[3] Woods correctly notes that BCR Inc.'s trial counsel did not object to the evidence presented by Woods and seems to believe that this concludes the matter – it does not. (Init. Resp. 40; 47-48). The failure to object to evidence waives only the question of whether the trial judge erred in admitting the evidence. The question nevertheless remains whether that evidence is some clear and convincing evidence that BCR Inc.'s conduct warranted the imposition of punitive damages.

evidence supports the decision to impose punitive damages. *Hale v. Finn*, 694 S.E.2d 51, 59 (S.C. App. 2010).[4]

The only evidence submitted to the master that even hints at the requisite clear and convincing evidence was BCR Inc.'s December 13, 2018, responses to Woods' requests to admit. BCR Inc. admitted "that during the time period between April 17, 2017 through April 29, 2017 [*i.e.* when Woods worked for BCR in Marietta, Georgia], Defendant did not work for Plaintiff within 100 miles of Columbia, South Carolina." (Damages Hrg. Tr. at 47-48). In other words, BCR Inc. admitted that Marietta, Georgia, is more than 100 miles from Columbia, South Carolina. That is not the relevant question. Rather, the question is what did BCR Inc. know, and what was its intent, at the time of the cease and desist letter. Therefore, the request to admit did not prove anything about the nature of BCR's conduct in sending the cease and desist letter.

BCR Inc. also admitted that the BCR location in Augusta, Georgia (which was within 100 miles of Premiere Roofing) did not exist on April 21, 2017, when Woods signed his BCR employment agreement with the covenant not to compete. (Damages Hrg. Tr. at 49).[5] Again, however, that is not the relevant question. Rather, the question is whether BCR Inc. knew at the time of the cease and desist letter that the Augusta location had not

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[4] At times throughout his Brief of Respondent, Woods makes statements like "[t]his is a case of baseless and protracted litigation." (Init. Resp.Br. at 49). Such statements might be relevant to a claim for abuse of process, but Woods did not make any such claim in this case. (See Answ., *passim*). Rather, the only relevant question here is BCR Inc.'s state of mind when its attorney sent the cease and desist letter. There is no clear and convincing evidence that, at the time of entrusting the matter to its attorney for investigation and action, BCR Inc. knew Woods was not in violation of the covenant not to compete.

[5] Having determined this when it reviewed and answered the requests to admit, BCR Inc. promptly moved on December 18, 2017 to amend its complaint by dropping the covenant not to compete claim, which involved the 100-mile radius (Augusta location) question, and replace it with claims based on Woods'failure to return advanced expenses, which had nothing to do with the 100-mile radius question. (See Motion to Amend and attached proposed Amended Complaint at R. __-__).

yet opened during the two-week period of Woods' employment with BCR. Woods never presented any evidence (clear and convincing or otherwise) that BCR Inc. knew this at that time. (See Damages Hrg. Tr. and Exhs., *passim*, at R. __-__ and __-__). Accordingly, the master erred in awarding any punitive damages for tortious interference with a contract.

Throughout his Brief of Respondent, Woods asserts that BCR Inc. lied to its counsel to procure a frivolous lawsuit against Woods, *i.e,* lied about there being a BCR location in Augusta, Georgia, which was within 100 miles of Premiere Roofing. (See, *e.g.*, Init. Resp. Br. at 12; see also *id.* at 3-4, 26-27 & n.3, 32-33, 36-38, 48, 50). All of this is based on the following statement by BCR Inc.'s counsel in the April 2022 summary judgment hearing before Judge Manning: "… and granted I was lied to, Your Honor, the location in Augusta ended up not being a current location." (Summary Judgment Hrg. Tr. at 8).

This statement by counsel is not evidence of anything, it being axiomatic that counsel's factual assertion is not evidence, even if the court believes counsel. *E.g.*, *Landry v. Landry*, 843 S.E.2d 491, 496 (S.C. 2020). Assuming this statement had some evidentiary value, it is not and cannot be relevant to the punitive damage questions at issue here. This statement was made to Judge Manning in a different hearing – it was not made to the master during the damages hearing – the statement to Judge Manning was not submitted to the master – the transcript of hearing before Judge Manning was not presented to the master and never made a part of the circuit court record. This statement also is not a reason appearing in the record to affirm. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). Although this statement appears in the Record on Appeal (See R.___), the rule necessarily applies only when the ground appearing in the Record on Appeal was in

fact submitted to or at least available to the judge that made the ruling being affirmed. Finally, counsel's various statements to Judge Manning reflect a divided loyalty driven by self-interest in defending against potential sanctions against the attorney in his individual capacity. Thus, even if the attorney's statements had been presented to and relied upon by the master, the patent self-interest in this statement could not be the basis for finding clear and convincing evidence to support the imposition of punitive damages.[6]

III. A *de novo* review of the *Gamble* factors demonstrates that the punitive damage award fails to satisfy the requirements of due process.

This Court undertakes a *de novo* review of the punitive damages award to determine whether it satisfies the requirements of due process. *Hale v. Finn*, 694 S.E.2d 51, 56 (S.C. App. 2010). Here, the master referenced the eight relevant factors outlined in *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991), which the master summarized as follows:

> (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonblly related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally (8) other factors deemed appropriate.

(Damages Order at 13). The master did not address three of these factors, those being the "duration of the conduct," which favors BCR Inc. because the only relevant conduct was

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[6] Woods also references a statement by the same counsel at an even earlier hearing in January 2019 before Judge Hood. (See Init. Resp. Br. at 26, n.3). At this hearing, counsel stated that he was given bad information that there was an office in Augusta at the time Woods was employed, and this "understanding" was that the same bad information was given to the law firm that sent the cease and desist letter. (Motion to Amend Hrg. Tr. at 11). This statement is not evidence of anything and fails to otherwise support the award of punitive damages for all of the same reasons noted in the text appended hereto. Moreover, his statement about information provided to someone else is hearsay. At the time of filing the Initial Reply Brief, there was a motion pending before this Court for leave to file a Rule 60(b), SCRCP, motion to set aside the damages order based on the self-interested conduct of this attorney, including the fact that BCR Inc. believed this matter had been ended in late 2018 or early 2019 but, without BCR Inc.'s knowledge, consent or authorization, this attorney continued to purse this matter for another 5½ years that ultimately resulted in the $4.7 Million Dollar judgment against BCR Inc. (See Motion for Leave to File Rule 60 Motion filed with this Court on September 23, 2024).

the sending of a single cease and desist letter, the "existence of similar past conduct," which favors BCR Inc. because there was no evidence of any similar past conduct, and "other factors," which favors BCR Inc. because there was no evidence of any other factors. (*Id.* at 13-14). As shown below, the factors "found" by Master fail to survive a *de novo* review.

With respect to factors (1) and (3) on culpability and awareness of the conduct, the master found BCR Inc. was aware at the time of the cease and desist letter that Woods was not in violation of the covenant not to compete, and BCR Inc. intended to harm Woods by seeking his termination. (Damages Order at 13). As set forth in Argument II, *supra*, there is no clear and convincing evidence that BCR Inc. knew at the time of the cease and desist letter that Woods had not violated the covenant not to compete and, although the letter sought termination, such is not actionable harm when based on enforcement of a contractual right. *Webb v. Elrod*, 418 S.E.2d 559, 561 (S.C. App. 1992) (enforcement of a right in one contract is not a basis for tortious interference with another contract).

With respect to factor (6) on the relationship between the punitive damages award and the harm caused by the conduct being punished, the master found that a 10-to-1 ratio was appropriate. (Damages Order at 13). Multipliers that exceed a single digit ratio are very rarely appropriate in awarding punitive damages. *Cody P. v. Bank of Am., N.A.,* 720 S.E.2d 473, 483 (S.C. App. 2011), quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 410 (2003). Thus, this factor weighs in favor of reversing the master.

Finally, and *most importantly*, with respect to factors (5) on deterrence and (7) on ability to pay, the master relied *solely* on BCR Inc.'s gross sales in 2021 and projected gross sales for 2022 – Woods did not submit any other evidence on ability to pay or the amount necessary for deterrence. Gross sales without any information on the costs,

expenses, and other obligations required to produce the gross sales income is not a valid basis for determining the amount of punitive damages and requires a reversal of the award. See *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 25 (S.C. 2010) (net worth is a valid and probably safest basis for awarding punitivie damages; remanding for new trial limited to net worth evidence and rejecting other types of income such as revenue, executive compensation, daily revenue, etc.); *accord Sulton v. Healthsouth Corp.*, 734 S.E.2d 641, 646 (S.C. 2012) (net operating revenue without an accounting for expenses and obligations is not a valid basis for punitive damages).

IV. Judge Manning erred in granting partial summary judgment for liability on Woods' counterclaims.

In reviewing orders granting summary judgment, appellate courts apply the same standard as the trial court. Summary judgment is appropriate only when there is no genuine issue of material fact. The appellate court views all ambiguities, conclusions, and inferences arising in and from the evidence in the light most favorable to the non-moving party. *Williams v. Jeffcoat*, ___ S.E.2d ___, ___ (S.C. 2024) [Op. No. 28236 (S.C. Sup. Ct. filed Sept. 18, 2024) (Howard Adv. Sh. No. 36 at 18, 21-22)]. When the moving party will bear the burden of proof at trial on the claim or cause of action (as Woods here), that party must demonstrate the absence of a genuine issue of material fact on each element of that claim. See *Gauld v. O'Shaugnessy Realty Co.*, 671 S.E.2d 79, 85 (S.C. App. 2008).

An element of intentional interference with a contract is the absence of justification, and justification exists if the accused party is exercising a contractual right. *Webb v. Elrod*, 418 S.E.2d 559, 561 (S.C. App. 1992). An element for recovery under the South Carolina Frivolous Civil Proceedings Sanctions Act is that the claim was frivolous or brought for an improper purpose. S.C. Code Ann. § 15-36-10(A)(3)(c). Here, the only "evidence" in the

record before Judge Manning supporting either of these elements were the statements by BCR Inc.'s counsel that he had been lied to about the Augusta office, and BCR Inc.'s responses to Woods' requests to admit. Those statements and admissions do not and cannot support summary judgment for the same earlier-noted reasons that these statements and admission do not support the imposition of punitive damages. (See n.6 and accompanying text, *infra*). Woods did not present any evidence to Judge Manning that BCR Inc. knew when it sent the cease and desist letter that the Augusta location had not yet opened when Woods worked for BCR. Moreover, counsel's statements about being lied to were self-serving efforts to protect his personal interest against exposure to personal liability for frivolous civil proceedings. This obvious self-interest and inherent credibility question creates an inference that the statements are not true and precludes summary judgment. *Anderson v. Augusta Chronicle*, 585 S.E.2d 506, 513 (S.C. App. 2003), *aff'd*, 619 S.E.2d 428 (S.C. 2005) (credibility determinations cannot be made to grant summary judgment).

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Brief of Appellant, it is respectfully submitted that this Court should reverse and reform or remand the awards of actual and punitive damages.

Respectfully Submitted,

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PROOF OF SERVICE

I, Robert L. Widener, counsel for Appellant, certify that on this 2nd day of October, 2024, that a copy of the Appellant's INITIAL REPLY BRIEF was served upon all counsel of record in the above-captioned matter via a copies of the email to this Court filing same at the email addresses listed below:

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