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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEE COUNTY
Court of Common Pleas
Richard L. Hinson, Special Referee

App. Case No. 2024-001025

Carroll D. Brown,..……..…...Appellant,

v.

John M. Baker dba Humpty Dumpty Mobile Home Park and Dream Home Properties, LLC…….……...……...……...……..……. Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

I. Did the special referee err in making a damages award that did not break down the components of the award?

II. If the special referee allowed any hearsay testimony, did that result in a reversible error?

III. If the special referee allowed any presentation of speculative damages evidence as a result of Appellant's spoliation, did that result in a reversible error?

STATEMENT OF THE CASE

This is an appeal by Carroll D. Brown ("Appellant") of the judgment rendered against him and in favor of John M. Baker ("Respondent") on Respondent's counterclaims. (R. pp. _____; Order and judgment as to counterclaims.) Respondent accepts Appellant's statement of the case as accurate and notes for clarification that the order that granted summary judgment in Respondent's favor on the counterclaims was as to liability only, thus necessitating the damages trial that resulted in the appealed order. (R. pp. _____; order granting summary judgment as to counterclaims.)

Respondent further notes that Appellant made no motion under Rules 52 or 59, SCRCP, nor any other motion directed at the special referee's order rendering the judgment.

STANDARD OF REVIEW

"On appeal from an action at law that was tried without a jury, the appellate court can correct errors of law, but the findings of fact will not be disturbed unless found to be without evidence which reasonably supports the judge's findings." Blackmon v. Weaver, 366 S.C. 245, 249, 621 S.E.2d 42, 44 (Ct. App. 2005) (citing Townes Assoc. Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)); accord Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 142, 719 S.E.2d 703, 706 (Ct. App. 2011). The trial judge's findings "have the force and effect of a jury verdict upon the issues, and are conclusive on appeal when supported by competent evidence." Beheler v. Natl. Grange Mut. Ins. Co., 252 S.C. 530, 535, 167 S.E.2d 436, 438 (1969). The appellate court's scope of review is limited to determining whether the findings of the lower court are reasonably supported by evidence and to correcting errors of law. Id.

A trial court's decision to admit or exclude evidence will not be disturbed on appeal unless that ruling was an abuse of discretion. Conner v. City of Forest Acres, 363 S.C. 460, 611 S.E.2d 905, 908 (2005). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.,* there is a reasonable probability the [decision] was influenced by the wrongly admitted or excluded evidence." Id. (internal citations omitted).

ARGUMENT

I. The special referee did not err by not breaking down the components of the damages award, nor is that issue preserved for review.

Appellant argues that the special referee erred by not putting a breakdown in his order of the components of the damages he awarded. The undersigned attorney is not aware of any legal authority in South Carolina that requires an order rendering a judgment for damages to contain a breakdown of the various components, and Appellant does not cite any. "South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." Glasscock, Inc. v. U.S. Fidelity & Guaranty Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). Appellant has abandoned this argument. See id.

It was not error for the special referee not to include a breakdown, but, even if it had been, Appellant did not preserve any issue about this for review. To be preserved for appellate review, an argument must have been both raised to and ruled upon by the trial court. E.g., Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). "Where a matter is not ruled on by the circuit court, the issue is not preserved for appellate review unless the complaining party

moves to amend the judgment pursuant to Rule 59(e)." Vespazziani v. McAlister, 307 S.C. 411, 413, 415 S.E.2d 427, 428 (Ct. App. 1992).

Appellant's recourse if unsatisfied with the level of detail in the appealed order was to make a post-judgment motion about it under Rule 52 or 59, SCRCP. He did not. Had he received an adverse ruling on such a motion, he could have appealed that. As it is, he makes his arguments concerning the need for a breakdown to this court – the appellate court – for the first time. The special referee did not rule on them and never had an opportunity to do so.

A party's unpreserved arguments cannot prevail on appeal. E.g., Hatfield v. Hatfield, 327 S.C. 360, 367, 489 S.E.2d 212, 216 (Ct. App. 1997). Appellant's argument is incorrect, but, as what may be more important a threshold matter, the argument is also not preserved for review. Wilder Corp., 330 S.C. 71; Vespazziani, 307 S.C. at 413.

II. The Appellant has not shown that the damages award was based on hearsay testimony, nor is that issue preserved for review.

Appellant argues that the special referee allowed hearsay testimony and overruled Appellant's objection to that testimony. An examination of the damages trial transcript reveals that is not what happened.

The portion of the transcript to which the Appellant cites, from the direct examination of Respondent, reads as follows:

> Q Okay. All right. The last topic, lower than market rent. What do you mean? Excuse me.
>
> A We checked with some more mobile home parks right around --
>
> MR. BLEDSOE: Objection.
>
> THE WITNESS: I checked --
>
> MR. BLEDSOE: Objection.
>
> THE COURT: What's your objection?

MR. BLEDSOE: That's hearsay. He's -- he's about -- to say he got information from other mobile home dealers.

THE COURT: Well, that's not -- he can -- he can say that other than what they told him. If he found out information, then you cross examine him on --

MR. BLEDSOE: Okay.

THE COURT: -- how he got it and if it comes from other people, then it would be hearsay.

MR. BARTH: All right.

By Mr. [Barth][1]:

Q Did you -- when you took the park back over and you started to look at the rent, you think y'all -- you weren't charging enough?

A That's right.

Q All right. Now, you had conversations with people that own mobile home parks.

A That's right.

Q All right. Would -- I don't know anything about mob-- mobile homes --

A Right.

Q -- but were you trying to compare comparable places?

A That's right. Yeah.

Q All right.

A Like 60-foot versus three-bedroom, 60-foot, stuff like that and how many they had in the two-bedroom.

MR. BLEDSOE: Again, I object to that, Your Honor.

THE COURT: He can go in -- he can go ahead and testify to it. You can cross examine him.

MR. BARTH: Based -- based --

[1] The transcript states Mr. Bledsoe resumed this questioning, but that appears to be a court reporter's error.

THE COURT: I can weed out what I'll -- I can put on --

MR. BARTH: Yeah.

THE COURT: -- here and not be in a jury.

By Mr. Barth:

Q Why do you think yours -- how much a month do you think you were undercharging?

A At least 100 dollars.

(R. pp. _____; transcript p. 82 ln. 22 through p. 85 ln. 1.)

At no point in this colloquy did Respondent actually testify to what the people he talked to told him. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. No hearsay was put before the court in this exchange. To the extent that Respondent would have testified to hearsay had Appellant's counsel not objected, Appellant's counsel succeeded in preventing that.

Also, Appellant does not argue that this testimony influenced or was necessary to support the amount of the judgment. "In order for an error to warrant reversal, the error must result in prejudice to the appellant." State v. Patterson, 367 S.C. 219, 224, 625 S.E.2d 239, 242 (Ct. App. 2006). Even if the Appellant had demonstrated the special referee committed error here, he would still not have shown it to be a reversible error. See id.

Appellant made no post-judgment motion directed at this issue. Though the argument would fail on its merits, it is not preserved for review by this court. Wilder Corp., 330 S.C. 71; Vespazziani, 307 S.C. at 413.

As with his first argument, Appellant offers no authority for his hearsay argument. It is abandoned. Glasscock, 348 S.C. at 81.

III. The Appellant has not shown that the special referee engaged in or relied on speculation, nor is that issue preserved for review.

As he admits in his brief, the Appellant acknowledged he destroyed receipt books and a ledger, thus eliminating the only evidence of the details of much of his wrongs and how much damage they did to Respondent. This was spoliation, and when a party loses or destroys evidence, an inference may be drawn by the factfinder that the lost or destroyed evidence would have been adverse to that party. Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990); Stokes v. Spartanburg Regional Med. Ctr., 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006).[2]

Appellant contends that the special referee erred in concluding that spoliation allowed the consideration of speculative damages, but neither the order nor the transcript indicates that is what the special referee did. (R. pp. ___; order and judgment as to counterclaims; transcript.) What the special referee did comment on is that Appellant's spoliation had made the damages determination more difficult. (R. pp. ___; order and judgment as to counterclaims.) He rendered a judgment for the damages that Respondent had proven, i.e., what was not speculative. (R. pp. ___; order and judgment as to counterclaims.) An examination of the transcript reveals that the estimations of damages on a mass scale (small amounts stolen from Respondent here and there, amounts the Appellant was bound to collect but did not) were based on what was known from the evidence that survived Appellant's destruction. (R. pp. ___; Respondent's testimony from transcript.)

> "Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with *reasonable* certainty or accuracy." Austin

[2] Appellant lists some things as elements of spoliation, but those are factors federal courts use in determining whether to issue sanctions for spoliation, as noted in the unpublished district court opinion (not Fourth Circuit opinion) Appellant cites.

> v. Stokes-Craven Holding Corp., 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010) (emphasis added) (quoting Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981)). Although the amount of damages may not "be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required." Id.

Jolly v. Gen. Elec. Co., 435 S.C. 607, 659, 869 S.E.2d 819, 847 (Ct. App. 2012).

Because of Appellant's spoliation, the special referee was permitted to draw an inference that the destroyed evidence would have been adverse to Appellant. The inferences that Respondent asked him to draw (and which he may have drawn) were quite reasonable: that the destroyed evidence would have shown thefts and other delicts in amounts consistent with the evidence that Appellant did not destroy. The actual evidence, plus the spoliation inferences which the law allows to be treated as evidence, shows that we do not reckon here with a record that is "without evidence which reasonably supports the judge's findings." Blackmon, 366 S.C. at 249.

As with his other arguments, Appellant has failed to support his spoliation/speculation argument with authority, thus abandoning it, Glasscock, 348 S.C. at 81, and has failed to preserve it for review by making any post-judgment motion about it. Wilder Corp., 330 S.C. 71; Vespazziani, 307 S.C. at 413.

CONCLUSION

Appellant has not carried his burden in this appeal. He has not preserved his arguments for review, has not supported them with authority, and is wrong on their substance. He has not demonstrated the special referee made a reversible error.

The judgment should be affirmed.

Respectfully submitted,

/s/ Andrew S. Radeker

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PROOF OF SERVICE

I certify that I have served the foregoing initial brief on the date given below by emailing it to opposing counsel at the address(es) noted below.

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Respectfully submitted,

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