

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
John C. Hayes, Circuit Court Judge

Civil Action Number: 2011-CP-26-07558

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SC Court of Appeals

James H. Bailey, Jr.,.....Respondent,

v.

Development Systems International, LLC,
David Austerson, John R. Curtis, James P. LaRose,
Dianne LaRose, Robert C. MacConnell, and Sandra Morkel,
of whom David Austerson, John R. Curtis, James P. LaRose,
Robert C. MacConnell, and Sandra Morkel are.....Appellants.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court properly award Respondent damages for lost wages where Respondent presented sufficient evidence of the amount of Respondent's actually- suffered losses, Appellants failed to raise an objection to the sufficiency of the evidence admitted, and Appellants failed to raise the issue to the trial judge?
- II. Did the trial court properly award Respondent damages against all Appellants where Appellants failed to request an apportionment of damages, failed to raise any objection to the damages awarded, and failed to raise the issue to the trial judge?
- III. Did the trial court properly impose liability upon Appellants where Respondent's Complaint and the conduct alleged therein related to the personal, willful misconduct and bad faith of Appellants, Appellants defaulted and failed to raise the issue of limited personal liability to the trial judge?

STATEMENT OF THE CASE

This case was commenced by the filing of a Summons and Complaint on September 12, 2011. In the Complaint, Respondent James H. Bailey, Jr. alleged causes of action for breach of contract, breach of contract accompanied by a fraudulent act, breach of fiduciary duty, fraud and misrepresentation, negligent misrepresentation, civil conspiracy, relief pursuant to S.C. Code Ann. §33-44-801 *et seq.*, and wrongful termination.

The Summons and Complaint were properly served on all Appellants on various dates; the last date of service being October 12, 2011. Appellants failed to file or serve a response to the Summons and Complaint within the time allowed under the South Carolina Rules of Civil Procedure, and on November 15, 2011, Respondent's counsel filed with the lower court a Motion and Affidavit of Default. An entry of default was entered by the clerk of court on the same date.

Thereafter, on January 9, 2012, the Honorable Judge Larry B. Hyman, Jr. executed an Order of Default as to Appellants. In his Order, Judge Hyman ruled that a hearing would be held to determine the amount of Respondent's damages. The Order was filed with the Clerk of Court on January 12, 2012. A damages hearing was scheduled by the court to take place on January 14, 2013. However, on January 11, 2013, Appellants filed a Motion seeking to set aside the lower court's previous Order of Default pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure. As a result, at the January 14, 2013 damages hearing, the trial judge granted a thirty-day continuance of the hearing so as to allow Appellants additional time in which to file affidavits or other materials in

support of their Motion. The Honorable Steven H. John entered a written Order to this effect on February 4, 2013.

In his Order, Judge John ruled that if Appellants were not successful in setting aside the Order of Default, Respondent and his counsel would be entitled to reimbursement of attorneys' fees and costs incurred as a result of the continuance requested by Appellants. On February 14, 2013, Defendant John R. Curtis filed an affidavit with the Court in support of the Motion to Set Aside Default. The damages hearing was scheduled for hearing on April 8, 2013, and written notice of the hearing was sent by the Clerk of Court to all parties on February 26, 2013.

After hearing arguments from counsel, the trial court took the Motion to Set Aside Default under advisement and proceeded with the damages hearing. During the hearing, Respondent gave testimony regarding his damages, and Appellants' counsel conducted a cross-examination of Respondent. Thereafter, by Order dated April 11, 2013, the Honorable John C. Hayes, III denied Appellants Motion to Set Aside Default and granted Respondent a judgment of default in the amount of \$520,017.45. Appellants did not seek reconsideration of this Order and instead, filed this appeal, challenging the amount of Respondent's damages.

ARGUMENT

Standard of Review

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 163, 375 S.E.2d 321, 323 (Ct. App. 1988). An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997).

I. THE TRIAL COURT PROPERLY AWARDED ACTUALLY-INCURRED DAMAGES IN THE FORM OF LOST WAGES TO RESPONDENT.

A. This Issue Is Not Properly Preserved For Appeal.

As a threshold matter, Appellants have not preserved their challenge to the trial court's award of lost wages based upon an alleged lack of specificity as to the manner in which these damages were calculated because Appellants failed to raise this issue, make any argument regarding the issue, or obtain a ruling on this issue from the trial court. *See l'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716 (2000) ("The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally

must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.”); see also, *Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995) (holding that the appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court). The purpose of this preservation requirement is to “enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” See *Roche v. South Carolina Alcoholic Beverage Control Comm'n*, 263 S.C. 451, 211 S.E.2d 243 (1975) (finding that the purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal).

In this case, Respondent testified during the damages hearing that the amount of his lost wages and commissions for the period of August 2010 through December 2012 was \$401,000.00, less \$6000.00 which he was paid in 2010. [Transcript, April 8, 2013, at p. 14, Ins. 9-12; p. 22, In. 23 – p. 23, In. 5]. Appellants never raised the issue of lack of specificity during the damages hearing, and counsel for Appellants never questioned Respondent during cross-examination how he calculated his lost wages and commissions. Even after Respondent offered documentation to Appellants' counsel that outlined how the commissions and wages were calculated, Appellants' counsel failed to review the document or question Respondent about its contents. [Transcript, April 8, 2013, at p. 20, In. 23 – p. 21, In. 15].

Thus, Appellants have not preserved for appeal their argument that the damages awarded to Respondent for lost wages was speculative or not supported by the evidence presented in the lower court.

B. Respondent Presented Evidence Of His Actually-Incurred Damages In The Form Of Lost Wages.

Appellants mischaracterize the trial court's award of damages to Respondent by describing the damages as "lost profits." [Appellants' Brief at p. 5]. However, the damages awarded in this case were for Respondent's actually-incurred damages in the form of lost wages, not lost profits. Thus, the standard of proof required for recovery of lost profits is not applicable here.

"Profits' have been defined as 'the net pecuniary gain from a transaction, the gross pecuniary gains diminished by the cost of obtaining them.'" *Drews Co., Inc. v. Ledwith-Wolfe Assocs., Inc.*, 296 S.C. 207, 371 S.E.2d 532 (1988) (quoting *Restatement of Contracts* § 331, Comment B (1932)); see also, *Mali v. Odom*, 295 S.C. 78, 367 S.E.2d 166 (Ct. App. 1988) (defining "profits" as the net of income over expenditures during a given period). While allowing recovery of lost profits, the South Carolina Supreme Court has required that lost profits be established with reasonable certainty. *S.C. Fin. Corp. v. West Side Fin. Co.*, 236 S.C. 109, 122, 113 S.E.2d 329, 336 (1960) (holding that recovery cannot be had for profits that are conjectural or speculative).

Here, Respondent provided testimony as to the amount of his lost wages, and the supporting documentation was filed with the Court. As such, Respondent's award of damages in the form of lost wages was supported by

sufficient evidence, and the trial court did not err in awarding Respondent damages for his actually-incurred lost wages.

II. THE TRIAL COURT PROPERLY AWARDED RESPONDENT DAMAGES AGAINST ALL APPELLANTS BECAUSE APPELLANTS FAILED TO REQUEST AN APPORTIONMENT OF DAMAGES.

A. This Issue Is Not Properly Preserved For Appeal.

As an initial matter, Appellants' argument that the trial court erred by failing to apportion damages among Appellants is not properly before this Court because it was not raised and ruled upon below. It is well settled law that arguments are only preserved for appellate review when they have been raised to and ruled on by the lower court. *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006); *Jackson v. Speed*, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997). In this case, Appellants did not request the trial judge apportion damages during the damages hearing, the Order of the trial court makes no reference to an apportionment of damages, and Appellants did not make any post-trial motion after the hearing. As a result, Appellants allegation of error is not properly preserved for appeal.

B. Appellants Failed To Make A Motion For Apportionment Of Damages And Are Jointly And Severally Liable For Respondent's Damages.

Assuming *arguendo* that Appellants properly raised the issue of apportionment of damages, Appellants failed to comply with the necessary statutory procedure in order to obtain an apportionment of damages. See S.C. Code Ann. § 15-38-15(C)(3) (2006). Under this code provision, Appellants were required to make a motion to the trial court and request the court apportion fault

among the various Appellants. However, Appellants made no argument whatsoever to the trial court regarding an apportionment of fault.

Further, while Appellants argue that they were not sued jointly and severally, a review of the Complaint clearly establishes that Appellants were joint tort-feasors, and Respondent sought damages against all Appellants for a single injury. In Respondent's prayer for relief, the Complaint sought one recovery against all of the defendants on the various causes of action. [Complaint at p. 17]. Thus, Appellants are jointly and severally liable for Respondent's damages. See *Collins v. Bisson Moving & Storage, Inc.*, 332 S.C. 290, 306, 504 S.E.2d 347, 356 (Ct. App. 1998) (finding that joint and several liability arises when two or more tort-feasors are responsible for a single injury). As noted by the South Carolina Supreme Court:

[A] single injury, which is the proximate result of the separate and independent acts of negligence of two or more parties, subjects the tort-feasors, even in the absence of community of design or concert of action, to a liability which is both joint and several, is a proposition recognized and approved in this state and supported by the great weight of authority elsewhere.

Rourk v. Selvey, 252 S.C. 25, 28, 164 S.E.2d 909, 910 (1968) (quoting *Pendleton v. Columbia Ry., Gas & Elec. Co.*, 133 S.C. 326, 331, 131 S.E. 265, 267 (1926)).

Here, not only did Respondent seek damages for a single injury, he alleged a civil conspiracy cause of action against Appellants in which he alleged a concert of action among Appellants. [Complaint at ¶¶ 79-83]. Appellants failed to answer the Complaint, were held in default and therefore, are deemed to have

admitted liability. "It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability." Roche v. Young Bros., 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) (citing Howard v. Holiday Inns Inc., 271 S.C. 238, 246 S.E.2d 880 (1978); Schenk v. National Health Care, Inc., 322 S.C. 316, 471 S.E.2d 736 (Ct. App. 1996); State ex rel. Medlock v. Love Shop, Ltd., 286 S.C. 486, 334 S.E.2d 528 (Ct. App. 1985)). As a result, Appellants cannot now argue that they are not joint tort-feasors, jointly and severally liable for Respondent's damages.

III. THE TRIAL COURT PROPERLY IMPOSED LIABILITY UPON APPELLANTS FOR THEIR OWN TORTIOUS CONDUCT.

A. This Issue Is Not Properly Preserved For Appeal.

In their Initial Brief, Appellants argue that the trial court erred by disregarding the terms of the Operating Agreement of Development Systems International, LLC (hereinafter "DSI") and imposing personal liability upon Appellants. [Appellants' Brief, p. 7]. However, Appellants failed to raise this issue in the lower court, failed to obtain a ruling on this issue, and therefore, failed to preserve this issue for appellate review. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); *see also, Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

B. Appellants Are Liable For Their Own Willful Misconduct And Bad Faith.

Under the terms of the Operating Agreement, the members of DSI are not liable “for any error of judgment or any mistake of fact or law . . . or for anything that such Members may do or refrain from doing . . . **for and on behalf of the Company . . . except in the case of their willful misconduct or their bad faith.**” [Complaint at Exhibit A, § 5.9 (emphasis added)]. Here, Respondent alleged bad faith and willful misconduct on the part of Appellants. As a result, the Operating Agreement does not relieve Appellants from liability. Moreover, by virtue of their default, Appellants have conceded the truth of these allegations and their liability to Respondent.

Further, the Uniform Limited Liability Act provision regarding liability of members (S.C. Code Ann. §33-44-303 (2006)) does not shield Appellants from liability. Under this code section, with certain exceptions, a member of a limited liability company is “not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.” S.C. Code Ann. §33-44-303(a) (2006). However, this provision is limited to circumstances where the member acts on behalf of the company and in furtherance of the company’s business. *16 Jade Street, LLC v. R. Design Construction Co., LLC*, 398 S.C. 338, 345, 728 S.E.2d 448, 452 (2012), *rev’d on other grounds at* Opinion No. 27305, 2013 S.C. LEXIS 218 (Filed August 28, 2013). In Respondent’s Complaint, the misconduct and bad faith alleged of Appellants was not done in furtherance of DSI, but rather for Appellants’ own

self-interest. The South Carolina Supreme Court concluded that "section 33-44-303(a) only protects non-tortfeasor members from vicarious liability and does not insulate the tortfeasor himself from personal liability for his actions." *Id.* at 349, 728 S.E.2d at 454. Therefore, Appellants are not shielded from personal liability for their own willful misconduct and bad faith, and the trial court did not err in imposing liability upon Appellants.

CONCLUSION

For the reasons discussed above, the circuit court's Order denying Appellants' Motion to Set Aside Default and granting default judgment should be affirmed.



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