THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 2008-CP-22-1345

J. Mars Sapp..... 30440 ...ndent,

v.

Will D. Wheeler, P.I. Leasing & Management, Inc ...., II, and
JDBD, LLC, ...Defendants,

Of whom Will D. Wheeler is the .....Appellant.

RESPONDENT'S FINAL BRIEF

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II. STATEMENT OF THE CASE

This is an appeal by Will D. Wheeler ("Wheeler") from a jury verdict in the Court of Common Pleas for Georgetown County entered June 4, 2010. In part, the verdict awarded plaintiff J. Mars Sapp ("Sapp") a judgment against defendant Wheeler in the amount of $252,798.00. (R. pp. 610-612). The trial judge also awarded Sapp $48,929.00 in legal fees against Wheeler and P.I. Leasing & Management, Inc. (R. pp. 7-13).

On September 30, 2008, Sapp filed a Complaint against P.I. Leasing & Management, Inc. ("P.I. Leasing") and Wheeler. Sapp sued P.I. Leasing for default on a commercial lease agreement (the "Lease") and sued Wheeler for breach of his personal guaranty of the Lease. Wheeler responded to the Complaint and denied liability. On October 6, 2009, Sapp filed an Amended Complaint naming P.I. Leasing, Wheeler, Kenneth D. Altman, II, and JDBD, LLC as defendants. The defendants responded to the Amended Complaint and denied liability. Wheeler was represented by James M. Griffin. Altman[1], P.I. Leasing, and JDBD were represented by G. Turner Perrow. Only Wheeler has appealed.

On June 1-3, 2010, the case was tried before a jury and the Honorable Thomas W. Cooper, Circuit Court Judge. At the close of Sapp's case in chief and at the close of all testimony, counsel for Wheeler moved for a directed verdict on Sapp's claim for future damages and for a directed verdict on the basis that Sapp's claim was barred by the applicable three year statute of limitations. (R. p. 179, line 3-p. 180, line 3; R. p. 269, line 1-p. 296, line 9). The trial court denied Wheeler's motions for directed verdict. (*Id.*). The trial court also denied Wheeler's request to charge the jury on the statute of limitations. (R. p. 291, lines 9-17).

[1] In the Amended Complaint, Altman was improperly identified. On Sapp's motion at trial, the trial judge ordered that the pleadings be corrected and that Altman would be identified by his correct name, Winston Kenneth Altman, II. (R. p. 3).

With the consent of Wheeler and P.I. Leasing, the court provided the jury a verdict form with separate entries for verdicts against Wheeler and P.I. Leasing. The trial judge instructed the jury that it was required to determine the amount of damages, if any, as to either or both defendants and without regard as to the other defendant. (R. p. 351, lines 12-21; R. p. 365, lines 15-24). On finding number 1, the jury returned a verdict in favor of Sapp against Wheeler in the amount of $252,798.00. On finding number 2, the jury returned a verdict in favor of Sapp against P.I. Leasing in the amount of $7,300.00. (R. p. 373, line 15-p. 374, line 14; R. p. 610). After the jury was discharged, Wheeler asserted that the verdicts against P.I. Leasing and Wheeler were inconsistent. Wheeler also filed written post trial motions moving for a new trial or a new trial *nisi remittitur* based on his claim that the jury's verdict is facially inconsistent, excessive, and not supported by the evidence. (R. pp. 44-47 which includes the Supplemental Record on Appeal pp. 46-1 through 46-5). Sapp responded to Wheeler's motion by addressing the merits of Wheeler's arguments and asserting that Wheeler waived the ability to challenge the verdict by failing to make such objections prior to dismissal of the jury. (R. pp. 48-56). By Order dated March 10, 2011, the trial court denied Wheeler's Motion, stating the objection was not timely made and therefore waived. (R. pp. 4-5). In addition, the Court reiterated its rulings made at trial on issues raised again in Wheeler's post trial motion. (R. p. 2). On April 4, 2011, Wheeler filed this appeal.

STATEMENT OF FACTS

Respondent J. Mars Sapp ("Sapp") is the owner of property consisting of real estate and a building of approximately 12,000 square feet located at 1918 Highway 17 North in Surfside Beach (hereinafter "Leased Premises"). On or about September 27, 1994, Sapp entered into a Lease (the "Lease) for the Leased Premises with P.I. Leasing & Management, Inc. ("P.I.

Leasing"). (R. p. 389-403). The Lease was signed by Wheeler on P.I. Leasing's behalf and witnessed by Jarvis Faircloth and Debbie Wheland. The term of the Lease was 20 years through September 30, 2014. The Leased Premises could be used for any lawful purpose by the tenant. (R. p. 172, line 19-p. 173, line 12).

Wheeler personally and individually guaranteed performance by P.I. Leasing of the lease obligations including payment of rent. (*Id.*). Wheeler had 75% ownership of P.I. Leasing with Jarvis Faircloth owning the other 25%. Although only a minority owner, Faircloth had authority to sign checks for P.I. Leasing. (R. p. 223, lines 9-20). Wheeler and P.I. Leasing were engaged in the video poker business. (R. p. 187, lines 2-15). At the Leased Premises, they had 135 poker machines and 225 employees. (R. p. 212, lines 2-8).

About three and one-half years into the lease term, on June 24, 1998, Wheeler secured Sapp's consent for P.I. Leasing to assign its interest in the Lease to Resort Properties South, Inc. The Lease required Sapp's consent to any assignment. Sapp consented to the assignment with the express stipulations that P.I. Leasing remained liable under the Lease after its assignment, and that Wheeler's guaranty remained in full force and effect. (R. p. 404). Even after the assignment of the Lease to Resort Properties South, Inc., Sapp continued to receive rent checks from P.I. Leasing through February, 2001. (R. pp. 512-514; R. p. 108, line 20-p.111, line 2). Thereafter, Sapp received rent checks through September 2007 from Save the Ocean Project, Inc., Coastal Rescue Mission, Ken Altman II, LLC, Ken Altman II, LLC and JDBD, LLC. (R. p. pp. 512-514). Every check received was signed by defendant Wheeler, defendant Altman, or Faircloth. (R. p. 106, lines 23-25; R. p. 107, lines 1-5). At no time did Wheeler ever provide written notice to Sapp that he was revoking his guaranty. (R. p. 106, lines 10-19).

As is typical with many commercial long term leases, the Lease had a rent escalation clause (in this case an annual escalation tied to the consumer price index), and it required the tenant to maintain insurance. Sapp's then attorney, William Booth, annually notified Wheeler of the rent increase through 2003. In 2003, Booth also communicated with Wheeler that the insurance was being cancelled. In response, Wheeler notified Booth that in the future he should contact in order of priority defendant Altman, Faircloth, and then Wheeler for rent increase notifications, insurance issues, and other lease matters. Wheeler told Booth, "You know, if one of those two don't take care of it, you can call me." (R. p. 233, line 15-p. 236, line 17). Wheeler also stated to Booth, "This is the person [Altman] that will take care of getting the rent paid. This is the person to talk to about any lease issues." (R. p. 238, line 20-p. 239, line 9). Wheeler gave Booth phone numbers for the trio. (R. p. 241, lines 10-16). Booth understood Altman to be the tenant's representative. (R. p. 240, lines 4-9). Altman and Faircloth are the same people with whom Booth communicated on behalf of P.I. Leasing at the inception of the Lease to negotiate its terms, to have it executed by Wheeler and to handle rent collection. (R. p. 241, line 17-p. 242, line 12; R. p. 405).

Defendant Altman is an accountant in Georgetown. He provided accounting services to Wheeler and P.I. Leasing. (R. p. 175, line 18-p. 176, line 2). At the inception of the Lease he collected rents from the property's occupants. (R. p. 405). He was the Registered Agent for defendants P.I. Leasing and JDBD, LLC. (R. p. 174, lines 11-16). JDBD was a business in which Wheeler was a 20% owner. (R. p. 208, line 18-p. 209, line 11). Two other partners were Jarvis Faircloth and Debbie Wheland Hightower, the same persons who witnessed Wheeler's execution of the Lease. (R. p. 389). On November 3, 2004, Altman advised Sapp that rent checks would be coming from JDBD, "a partnership owned by Wheeler." (R. p. 410). There was

no indication that there had been any change in the tenant at that time. There was no written communication of any notification of a change in the tenant except when Mr. Sapp consented pursuant to Plaintiff's Trial Exhibit 2. (R. p. 404). In correspondence from Sapp's attorney in October 2005, notice of a rent increase was sent to Altman stating "this letter is to inform Will Wheeler and P.I. Leasing and Management, Inc. of the increase in monthly rent for the lease effective October 1, 2005." (R. p. 413). Altman never disputed Wheeler's liability. In fact, he, JDBD, and P.I. Leasing asserted that Wheeler had ongoing liability as late as June 2007 in their Answers to the Amended Complaint. (R. pp. 26-27; R. p. 37; R. p. 41). When the lease payments were in default and Sapp was attempting to secure his property, in an email dated April 30, 2008, Altman, while refusing to provide Sapp with Wheeler's contact information, stated, "First. I have only a responsibility to Mr. Wheeler." (R. p. 177, line 12-p. 178, line 11). Sapp believed that Altman was acting on Wheeler's behalf (R. p. 132, lines 1-3) and Altman's statements and actions confirm he was acting for Wheeler.

P.I. Leasing, Resort Properties South, Inc., and Wheeler defaulted on the Lease obligations by failing to perform and make lease payments coming due after September 2007. (R. p. 104, line 23-p. 105, line 13). On January 4, 2008, Sapp's counsel sent a letter to Altman demanding past due rent payments. (R. p. 117, line 24-p. 118, line 17; R. p. 450). On March 7, 2008, Sapp's counsel sent another demand letter by certified mail to P.I. Leasing, Resort Properties, Ken Altman, Ken Altman, LLC, JDBD, and Wheeler. (R. p. 119, line 5-p. 120, line 18; R. pp. 451-454).

In April 2008, Sapp filed a case in the Magistrate's Court of Horry County seeking a Writ of Ejectment which resulted in the Magistrate issuing a Rule to Vacate or Show Cause. (R. pp.

427-428). On June 12, 2008, the Magistrate's Court of Horry County issued a Writ of Ejectment to P.I. Leasing, Ken Altman, and JDBD, LLC. (R. p. 429).

Upon securing the Leased Premises, Sapp actively attempted to lease them to mitigate his damages. Sapp employed a real estate brokerage firm, Coldwell Banker Chicora Real Estate ("Chicora Realty"), to market and list the property for lease. (R. p. 115, line 25-p. 116, line 4; R. pp. 431-434). Sapp entered into the following leases since the time of default through date of trial:

- April 1, 2008 – Lease with Plantation Resort Properties, Inc. for a portion of the Leased Premises. (R. pp. 435-449)
- December 1, 2008 – Lease with Scott Robyler for 12,000 square feet of the premises. (R. pp. 455-473). This tenant paid four months of rent, defaulted, and was evicted. (R. p. 165, line 20-p. 166, line 2; R. p. 84, lines 10-21)
- January 1, 2010 – Lease with Alpha Omega Computers, LLC for a portion of the premises. (R. pp. 474-484).

From these leases, Sapp netted only $20,623.28 through the time of trial. (R. pp. 485-490). This amount is determined by taking the net income and deducting the expenses associated with the new leases – expenses for which P.I. Leasing, Resort Properties South, Inc, and Wheeler were responsible under the Lease Agreement and Guaranty. (R. p. 391).

II. ARGUMENT

A. Where the evidence as to reasonable rental value was conflicting, the trial court properly denied Wheeler's Motion for Directed Verdict on Sapp's claim for future damages

The trial court properly denied Wheeler's Motion for Directed Verdict on Sapp's claim for future damages because there was evidence that the "reasonable rental value" at the time of

termination of the lease was less than the reserved rent under the lease. Additionally, the "reasonable rental value" at the time of termination of the lease was a question of fact for the jury.

On appeal from an order denying a directed verdict, an appellate court views the evidence and all reasonable inferences in a light most favorable to the non-moving party. *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct.App. 2006) (citing *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 476, 514, S.E.2d, 126, 130 (1999)). In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and to deny the motion when either the evidence yields more than one inference or its inference is in doubt. *Estate of Carr ex rel. Bolton v. Circle Enterprises, Inc.*, 379 S.C. 31, 664 S.E.2d 83 (Ct.App. 2008) (citing *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006)). The appellate court will reverse the trial court's ruling on a directed verdict motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law. (*Id.*). When considering directed verdict motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct.App. 2006) (citing *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 463, 629 S.E.2d 663 (2006)).

The trial court held that the measure of future damages is controlled by the language in the Lease. (R. p. 333, lines 11-16). Section 9.02 of the Lease provides that damages for loss of future rental income shall be:

> "...the worth at the time of such termination of the excess, if any, of the amount of rent and charges equivalent to rent reserved in this Lease for the remainder of the stated term over the then reasonable

> rental value of the Leased premises for the remainder of the stated term." (R. p. 397).

Thus, in order to calculate future damages, the finder of fact must compare the rent reserved in the Lease to the "reasonable rental value" of the Leased Premises.

At the time the lease went into default, the monthly rent was $6,618.00. (R. p. 105, lines 1-25). From the monthly term to which the last rent payment was applied (September 2007), 84 months remained on the term of the Lease (October 2007 through October 2014). Thus, with no allowance for annual rental increases as permitted by the Lease, the monthly rent reserved for the term of the Lease from the date of default was $555,912.00. There is no contrary evidence in the record regarding the rent reserved for the term of the Lease. At dispute, however, is the "reasonable rental value" at the time of the termination of the lease. That value was disputed by the parties, and was a question for the jury.

One method of calculating "reasonable rental value" would be based on actual rents received – the truest measure of value. Wheeler presented another possible method of calculating "reasonable rental value" based on estimates by a real estate agent. Wheeler argued that Sapp should not suffer any loss or damage based on estimates, not actual data. Wheeler's argument was undercut by his agent, Altman, who stated in an August 3, 2007 letter that the leased premises were not worth the rent. (R. p. 416).

Using the actual rental income for the property as the "reasonable rental value," Sapp presented evidence that the total projected loss was $494,053 over the remaining term of the lease. Once Sapp regained control of his property in the Spring of 2008 through the time of trial, Sapp employed Chicora Realty to market and list the property for lease. (R. p. 115, line 23-p. 116, line 16; R. p. 429; R. pp. 431-434). From these efforts, Sapp was able to lease the Leased Premises and netted $20,623.28 in income between April, 2008 and May, 2010. (R. pp. 484-

490). Thus, for the 26 months the property was actually leased preceding the trial, Sapp's average monthly lease income was $793 ($20,623.28 ÷ 26 = 793). Sapp asserts that the actual rents received is the "reasonable rental value of the Leased Premises."

Comparing the rent reserved to the actual receipts as the reasonable rental value, Sapp calculated his loss at $494,053.

84 months (Oct. 2007 – Oct. 2014) x $6,618 =		$555,912
Less:		
Rent from April 2008 – May 2010 =	$20,623	
Estimated rent June 2010 – Oct. 2014 (52 mos. x $793) =	$41,236	
Total deduction:		$61,859
Total damages:		$494,053

Sapp presented to the jury an upper range of actual damages against Wheeler in an approximate amount of $494,000.00. The jury returned a verdict against Wheeler for $252,798.00, or approximately 51% of the total damages Sapp sought in the case.

Based on Section 9.02 of the Lease, Sapp presented clear evidence of his damages due to loss of future rental income by using actual income as the measure of "reasonable rental value." Because the "reasonable rental value" of the leased premises was subject to different interpretations, it was a proper question for the jury. *J.J. Lawter Plumbing v. Wen Chow International Trade and Investment Company*, 286 S.C. 49, 331 S.E.2d 789 (Ct.App. 1985). The jury determined this fact question within the range of damages presented.

B. The trial court properly denied Wheeler's Motion for Directed Verdict on the claim that Sapp failed to timely file his action to enforce Wheeler's guarantee when suit was filed within one year of the rental payments going into default

Sapp brought the action to enforce the guaranty against Wheeler within a year after default on the Lease payments. The last Lease payment was made in January 2008 and applied

to the September 2007 rent. Suit was filed on the guaranty on September 30, 2008. (R. pp. 14-18).

Under South Carolina law, a party must commence an action upon a contract within three years of the date the cause of action accrues. *S.C. Code Ann.* § 15-3-530 (1976). A cause or right of action accrues so as to start the running of the statute of limitations, as soon as the right to institute and maintain the action arises. *Walter J. Klein Co. v. Kneece*, 239 S.C. 478, 123 S.E.2d 870 (1962). Generally, the statute begins to run on a guaranty agreement on the breach of the underlying obligation triggering the guarantor's obligations. Thus, the statute of limitations on an action on an absolute guaranty, which is conditioned only on the debtor's default, begins to run when the obligation matures and the debtor defaults. *See 38 Am. Jur. 2d Guaranty § 96.* A default or nonperformance by the principal debtor generally is required to maintain a cause of action in contract against a guarantor. *54 C.J.S. Limitations of Actions § 219 Guaranty Contracts.*

Sapp's right to institute and maintain an action on the Lease guaranty did not arise until October 2007. Sapp entered into the Lease with P.I. Leasing in 1994. The Lease was assigned to Resort Properties South, Inc. in 1998. There was no other assignment of lease. There had been no substitution of any tenant, and Sapp continued to receive rent payments. The payments were made in the amounts required by the Lease. (R. p. 105, lines 14-16). As late as 2007, Sapp believed the actual tenant at the Leased Premises was Resort Properties South, the entity to which P.I. Leasing had assigned its leasehold interest in 1998. (R. p. 112, lines 1-5; R. p. 404). The Lease and the Consent of Landlord to the Assignment of Lease were the only leasing documents ever executed by Sapp for the Leased Premises from 1994 until Sapp leased a portion of the premises to Plantation Resort Properties beginning April 1, 2008. The Lease and the

Consent of Landlord to the Assignment of Lease were in effect for the Leased Premises from the date of Lease's commencement in 1994 through the date of its default in October 2007.[2] Sapp received all payments due under the Lease, in the correct amount, from 1994 through September 2007. Every check Sapp received was signed by Wheeler, Altman, or Faircloth, the same trio involved at the inception of the Lease in 1994. (R. p. 106, line 23-p. 107, line 5; R. p. 405). Sapp had no cause of action against Wheeler until September 2007, when the lease payment was not received. (R. p. 450).

Wheeler erroneously contends P.I. Leasing and Resort Properties South, Inc. stopped performing under the Lease in February, 2001, after which time payments were no longer issued in the direct name of P.I. Leasing or Resort Properties South, Inc. However, Wheeler fails to point out that payments continued to be made to Sapp through Altman, Wheeler's accountant and representative, until January 2008. Further, many were made in the name of a business (JDBD) in which Wheeler had a 20% interest, and for which Altman stated Wheeler was the owner. The Lease does not designate nor does it require any particular party to issue the lease payment. (R. pp. 389-403). In the absence of any express renunciation of the Lease by Resort Properties South or any request to substitute a tenant, Sapp would have every right to rely on his written documents. Sapp had no reason to declare any default by the Tenant until September 2007 when the lease payments became delinquent. Therefore, payment and performance under the Lease and its assignment continued through September 2007.

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[2] Sapp learned in 2008 that Altman had illegally executed a lease naming JDBD, LLC as landlord and Plantation Resort Properties, Inc. as tenant. (R. p. 112, line 24-p. 113, line 6; R. p. 114, lines 4-22). Sapp continued to understand that Resort Properties South was still his tenant into at least 2007. (R. p. 112, lines 1-5). The trial judge, while considering directed verdict motions, stated that any leases for which Sapp did not give his consent were legally void and did not impact the guarantee. (R. p. 263, line 19-p. 265, line 8).

Further, Wheeler's actions after February, 2001 also indicate continued performance under the Lease. In 2003, Sapp's then attorney, William Booth, communicated with Wheeler regarding rent increase notifications, insurance issues, and other lease matters. (R. p. 233, line 15-p. 236, line 17). Wheeler stated to Booth, "This is the person [Altman] that will take care of getting the rent paid. This is the person to talk to about any lease issues." (R. p. 238, line 20-p. 239, line 9). Based on Wheeler's instructions, Booth understood Altman to be the tenant's representative. (R. p. 240, lines 4-9). Booth then sent Altman annual rent increase letters from 2004 through 2006. In each of these years, Sapp received the increased rent and therefore further assurance that performance under the Lease continued. (R. p. 235, lines 10-22). On one occasion, Booth specifically requested that Altman relay information to Mr. Wheeler. (R. p. 413).

Sapp undisputedly received payment under the lease through the September, 2007 term. Sapp received acknowledgement of annual rent increases through 2006. Sapp simply had no a cause of action against Wheeler until payments stopped being made. The breach of the underlying obligation did not occur until September 2007, when Sapp's cause of action against Wheeler first accrued. Sapp filed his Complaint a year later, well within any applicable statute of limitation.

C. As the Lease payments were made until a year before Sapp filed suit, the trial court properly denied Wheeler's request for a jury charge on the three year statute of limitations for a breach of contract action when Sapp did not know and should not have known that there might have been a breach of the guaranty more than three years before he filed suit

The trial Court correctly refused to charge the jury on this issue. There was no factual issue involving the statute of limitations. Sapp filed the action against Wheeler less than one year after default on the Lease Agreement guaranty.

It is the trial court's function to charge the jury on the applicable law as raised by the pleadings and supported by the evidence. In order to warrant reversal for failure to give a requested charge, the refusal must be both erroneous and prejudicial. *Clark v. Cantrell*, 332 S.C. 433, 504 S.E.2d 605 (Ct. App. 1998) (citing *Dalon v. Golden Lanes, Inc.*, 320 S.C. 534, 540, 466 S.E.2d 368, 372 (Ct. App. 1996)). The court acts correctly when it charges the jury on the law framed by the issues as made by the pleadings and the facts developed by the evidence in support of those issues. *Davis v. Tripp*, 338 S.C. 226, 525 S.E.2d 528 (1999) (citing *Tucker v. Reynolds*, 268 S.C. 330, 335, 233 S.E.2d 402, 404 (1977)). Wheeler failed to develop evidence to send this issue to the jury.

Mars Sapp is a salesman selling billboard advertising in Columbia, South Carolina. (R. p. 102, line 18-p. 103, line 7). He has never owned and operated a company with 225 employees and 135 poker machines – in one location – much less the other locations Wheeler had. Sapp's investments consist of the Leased Premises and a rental house. Sapp had a written lease. Sapp had Wheeler's written guaranty of the Lease. He consented once to it being assigned as long as Wheeler acknowledged the continuation of his guaranty. He did not consent to any other tenant using the Leased Premises. The trial Judge correctly found that any attempt to lease the premises without Sapp's consent and knowledge would be void and would not affect the guaranty. (R. p. 263, line 19-p. 265, line 8).

Wheeler never wrote Sapp to terminate P.I. Leasing's continuing obligations under the assignment of the Lease. Wheeler never wrote Sapp to terminate his guaranty. The assignee of the Lease, Resort Properties South, never wrote Sapp to terminate the Lease. There is nothing in the record that Resort Properties South ever contacted Sapp, orally or in writing to terminate the Lease. In a completely self serving statement, Wheeler alleges that he notified Sapp by phone in

July 2000 that the poker machines were removed from the building and "we are done with it." (R. p. 200, line 7). Even in this alleged conversation it is not clear what Wheeler was intending to convey, and he does not repudiate anything on behalf of Resort Properties South, a business with which he testified he had no involvement. (R. p. 197, line 9-p. 198, line 25). Further, in February 2001 (months after Wheeler alleged the foregoing phone conversation), P. I. Leasing paid rent for the property. (R. pp. 512-514).

Wheeler, Faircloth, and Altman sent regular rental checks for the Leased Premises until the Fall of 2007. Wheeler and Faircloth worked together in at least two businesses (P.I. Leasing and JDBD). Before video poker, Wheeler was in the bingo business. It would not have been unusual or raised any suspicion for rent checks to come from a variety of sources, especially since the rent was paid in the correct amount according to the Lease, and according to the annual rent increases. It certainly would not be unusual for Altman to send checks from JDBD – a business which he stated was owned by Wheeler. Altman did Wheeler's accounting work, and collected money on his behalf. Wheeler, Faircloth, and Altman were all involved at the inception of the Lease in negotiating it, executing it, and collecting and remitting rent payments. (R. p. 405). In 2004, four years after video poker was outlawed, Wheeler instructed Mr. Booth to only come to him if Altman and Faircloth could not handle matters pertaining to the Lease and gave Booth phone numbers for the three. He did not repudiate either the Lease or his guaranty at that time. (R. p. 235, line 23-p. 236, line 17). Instead, he affirmed by implication his ongoing responsibility.

Despite receiving rent checks from several sources over the life of the Lease, the trial judge correctly held:

> [T]he statute of limitations doesn't begin to run until, until Mr. Sapp in this particular case knew or in the exercise of ordinary and

> reasonable diligence should have known that he had a right of cause of action against another entity. In this case he was being paid and the checks were coming from everybody and everywhere and every entity that was out there. The Ocean people were sending him and I don't know, you know, I realize that those were bingo things, but I thought they were coming from Dana Beach or somebody. It looks like that everybody but the Coastal Conversation League was paying rent on this place, and Mr. Sapp would have seemed to me would have had no reason to believe that he had a right of cause of action against Mr. Wheeler as long as he was still getting his rent. He said, of course, that he was dealing with these three and I guess this is where the shell game that I was talking about comes into play, but as I go back it looks like from 1994, Mr. Altman, Mr. Faircloth and Mr. Wheeler had been involved somehow or another in this, not all in the same legal status, but clearly in some sort of a cooperative venture where whether they were keeping the books for each other or advising one another or had some partial interest in the company of another is not clear, and I don't think it has to be clear to Mr. Sapp as long as he's getting his payment from somebody that has some connection with those entities or has one of their signatures on the check. He did not have any reason to believe that he had a cause of action against Mr. Wheeler until the payments quit coming from anybody, and it's my understanding that suit was filed thereafter within the statute of limitations.

R. p. 269, line 23-p. 271, line 1.

The pleadings and evidence presented in this case do not create a factual issue as to the date that Sapp's cause of action accrued. (R. p. 291, lines 9-17). The trial court's refusal to instruct the jury on the statute of limitations was neither erroneous nor prejudicial to Wheeler.

There is no conflicting evidence and no factual issue as to the date that Sapp's cause of action against Wheeler accrued. The evidence shows that P.I. Leasing and multiple other parties made rent payments to Sapp under the one and only lease agreement in effect from 1994 through September 2007. The Lease Agreement does not specify or direct any particular entity or party to make the lease payment. The trial court properly refused to charge the jury on the statute of limitations.

D. The trial court properly denied Wheeler's Motion for a New Trial on the claim that the verdict was irreconcilably inconsistent and excessive.

1. Defendant Wheeler waived the right to claim inconsistent verdict.

Before the trial judge discharged the jury he solicited objections to the jury's verdict. Wheeler sat silently and agreed that the verdict and its form were proper. (R. p. 374, line 22-p. 375, line 7). The jury was then discharged, and Wheeler immediately alleged that the verdict was inconsistent. (R. p. 381, lines 19-23). If the jury's verdict is inconsistent, the defect was curable had Wheeler raised the issue before discharge. Wheeler allowed a potentially curable defect to become incurable by not timely raising the issue, and not asking the trial judge to give the jury further instructions.

In *Camden v. Hilton*, 360 S.C. 164, 600 S.E.2d 88 (Ct.App. 2004), the South Carolina Court of Appeals held that the trial court erred in entertaining a post-trial motion regarding an inconsistent verdict because it was not presented to the Court prior to the jury being discharged. The Court of Appeals noted that this rule has been followed since at least 1920. More specifically, in the case of *Dykema v. Carolina Emergency Physicians, P.C.,* the South Carolina Supreme Court stated:

> This Court has repeatedly held that a party should not be permitted to sit idly by while a verdict erroneous in form is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence.

348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002).

In *Limehouse v. Southern Ry. Co.*, 216 S.C. 424, 58 S.E.2d 685 (1950), the South Carolina Supreme Court held it is well established that where a verdict is objectionable as to form, the party who desires to complain should call that fact to the Court's attention when the verdict is published. Otherwise, the right to do so is waived. *Rhame v. City of Sumter*, 113 S.C.

151, 101 S.E. 832; *McAlister v. Thomas & Howard Co.*, 116 S.C. 319, 108 S.E. 94; *Hussman Refrigerator & Supply Co. v. Cash & Carry Grocer, Inc.*, 134 S.C. 191, 132 S.E. 173.

Wheeler cites *Collins v. Johnson*, 245 S.C. 215, 225, 139 S.E.2d 915, 920 (1965) for the proposition that the rule requiring that an objection must be raised prior to the discharge of the jury does not apply when the verdict is a matter of substance and not form. In *Collins*, the jury returned a verdict under the doctrine of respondeat superior against both an employer and employee for actual damages, but only against the employer for punitive damages. No objection was made to the verdict prior to the jury being discharged. The employer appealed contending that the verdict for punitive damages against it alone amounted to an exoneration of the employee of any willfulness, and that since the employee was so exonerated, the employer should not be held liable for punitive damages. Because the court could not say as a matter of law whether the jury exonerated the employee of any willfulness, the court remanded the case for a new trial.

Collins is strikingly dissimilar from the case *sub judice*. Wheeler's claim that the verdict is inconsistent is a matter of form, not substance. The jury awarded Sapp actual damages against both P.I. Leasing and Wheeler. The jury did not award punitive damages against either. There is no inconsistency or ambiguity in the substance of the jury finding P.I. Leasing breached its Lease and Wheeler breached his Guaranty Agreement. Notably, *Collins* is also not on point because it involves the law of respondeat superior. It is not a contract or guaranty case; it is a tort case. Further, it has not been followed for the proposition Appellant asserts by any South Carolina reported cases.

Wheeler did not object to the style of a verdict form which provided separate findings for liability and separate findings for damages' awards against P.I. Leasing and against Wheeler nor

did Wheeler object to the Trial Judge's instructions concerning the form. These instructions did not require the jury to find the same amount of damages in completing the form. In fact, the Trial Judge stated he could cure any defects, and that the jury should award the "amount of damages, if any, that you find have been proven as to each of these causes of action." (R. p. 363, line 16-p. 365, line 24).

When the jury returned a verdict providing the separate and different damages' awards against these Defendants, Wheeler did not object. Wheeler should not now be allowed to gain a retrial by his failure to object during the jury's presence, especially after his consent to the verdict form and the Court's explanation to the jury on how to complete it. Wheeler waived any and all rights to claim an inconsistent jury verdict.

2. The jury's verdict is not inconsistent and not excessive.

Notwithstanding Wheeler's failure to object in the presence of the jury, the jury's verdict is consistent with the evidence presented in the case. The jury returned a verdict in favor of Sapp against Wheeler in the amount of $252,798.00. The jury returned a verdict in favor of Sapp against P.I. Leasing in the amount of $7,300.00.

In *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66 (Ct.App. 1994), the South Carolina Court of Appeals held that it is the duty of the court to sustain a verdict when a logical reason for reconciling the verdict can be found. *Rhodes v. Winn-Dixie Greenville, Inc.*, 249 S.C. 526, 155 S.E.2d 308 (1967); *Haskins v. Fairfield Elec. Co-op.*, 283 S.C. 229, 321 S.E.2d 185 (Ct.App. 1984), *overruled in part other grounds, O'Neal v. Bowles,* 314 S.C. 525, 431 S.E.2d 555 (1993). *See also New York Carpet World v. Houston,* 292 S.C. 101, 354 S.E.2d 924 (Ct.App. 1987) (a jury's verdict should be affirmed if it is possible to do so and carry into

effect the jury's clear intention; it is the Court of Appeals' duty to uphold jury verdicts if they can be logically reconciled).

Wheeler cites *Krepps by Krepps v. Ausen*, 324 S.C. 597, 479 S.E.2d 290 (Ct.App. 1996) for the proposition that "the court cannot lawfully enter judgment on an inconsistent or incomplete verdict." Wheeler cites *Johnson v. Phillips*, 315 S.C. 407, 433 S.E.2d 895 (Ct.App. 1993) for the proposition that "if the jury renders an ambiguous verdict, the court must resubmit the case to the jury." Wheeler cites *Stevens v. Allen*, 336 S.C. 439, 520 S.E.2d 625 (Ct.App. 1999) for the proposition that "if a verdict is facially inconsistent, the trial judge has a duty to grant a party's motion for a new trial." The inconsistent verdicts discussed in all three cases involved a jury's verdict for the Plaintiff of "no damages." The verdicts had to be resent to the juries with instructions charging the jury either to assess a definite dollar amount in damages (nominal or actual) for the plaintiff or to return a verdict for the defendant. The verdict in the case *sub judice* is dissimilar from the ones discussed in *Krepps*, *Johnson*, and *Stevens*. The jury – as the finder of fact - awarded Sapp actual damages against both Wheeler and P.I. Leasing. There is no inconsistency or ambiguity in the jury finding P.I. Leasing breached its Lease Agreement and Wheeler breached his Guaranty Agreement.

Defendant Wheeler cites *Prego v. Hobart*, 287 S.C. 116, 118, 336 S.E.2d, 725,726 (Ct.App. 1985) for the proposition that "verdicts which are irreconcilably inconsistent should not stand, and a new trial should be granted, because the parties and the judge 'should not be required to guess as to what a jury sought to render.'" The inconsistent verdict rendered in *Prego* was one in which the jury found in favor of one plaintiff's claim but against a second plaintiff's claim. The result left a defendant liable to one plaintiff but not to the other on the same set of facts. Sapp's case is factually dissimilar from *Prego*. This jury found both

defendant P.I. Leasing and defendant Wheeler liable. There is no ambiguity and no inconsistency. The jury found that both the Lease and Guaranty were breached.

Clear facts were presented to this jury which explains a greater damage award against defendant Wheeler than against P.I. Leasing. Taking the evidence in the light most favorable to the Sapp, it was clearly established that P.I. Leasing (the principal on the Lease Agreement) ceased business operations years ago and was a dissolved corporation. Specifically, P.I. Leasing admitted in its Answer to Plaintiff's Amended Complaint that P.I. Leasing was no longer in business and was dissolved with the South Carolina Secretary of State's Office as of July 30, 2007. Wheeler further testified that P.I. Leasing ceased operations before October 2007, when Plaintiff Sapp last received payment under the Lease Agreement. P.I. Leasing assigned its interest in the lease in 1998 to Resort Properties South, Inc., at which time defendant Wheeler acknowledged the continuing effect of his guaranty. (R. p. 404). Evidence showed that P.I. Leasing last made a direct payment under the Lease Agreement in 2001. A finding of lesser damages against a corporation which dissolved at about the same time as the breach and termination of the Lease Agreement and prior to the filing of this lawsuit is not inconsistent with the facts of the case.

In short, the jury was presented a case against P.I. Leasing as the principal on a Lease Agreement entered in 1994. P.I. Leasing assigned its interest in the lease, ceased operations, and dissolved about the time of the breach. It is clear the jury did not warrant a significant damage award against a corporation no longer in existence. Instead, the evidence established a case for significant actual damages for past due and future rent against Wheeler, the individual guarantor of the Lease Agreement which runs through October 2014 and the guarantor of the obligations of **both** P.I Leasing and Resort Properties South. Therefore, different damages' awards against the

breaching individual guarantor and the breaching dissolved corporation are consistent with the facts of this case.

3. The jury instructions, to which no objection was made, allow for different damage verdicts.

The trial judge instructed the jury that it was not bound to reach the same verdict against the Defendants. The trial judge also instructed the jury that it could award different damages against the Defendants.

The trial judge charged the jury:

> So, as I've said, if you determine that the Plaintiff is entitled to a verdict against either the Defendant P.I. Leasing Management or the Defendant Mr. Wheeler or both then you would next decide how much in damages you should award the Plaintiff against either or both Defendant.
>
> (R. p. 351, lines 12-21).

The Defendants took no exception to these charges. (R. p. 369, line 5-p. 370, line 1). Further, they took no exception to the Trial Judge's explanation of completing the verdict form.

> I tell you, ladies and gentlemen, that the Plaintiff is not allowed to collect duplicative or cumulative damages in any event, but this Court will determine if that has been done. You're asked simply to write the amount of damages, if any, that you find have been proven as to each of these causes of action by the greater weight or the preponderance of the evidence without regard to any damage that might exist on another one. The Court will take care of assuring that there's no duplication or cumulative damages.

(R. p. 365, lines 15-24).

On a third occasion, the Trial Judge instructed the jury that they should evaluate each cause of action independently of other causes of action. Specifically, the Trial Judge stated:

> I tell you further, ladies and gentlemen, that your verdict on one cause of action does not necessarily determine your verdict on another cause of action. You must evaluate and view the evidence on each of these causes of action independently

and unto itself and determine the verdict as to each cause independent of any other cause of action that you've brought.

(R. p. 368, lines 18-25).

The jury followed the Trial Judge's instructions. It evaluated the evidence of each claim "independent of any other cause of action." It returned a verdict on different claims "without regard to any damage that might exist on another one." The jury performed its function according to the instructions it was given. Having acquiesced in the Court's charge, P.I. Leasing and Wheeler cannot now complain about the amounts being different when the jury was told it could so find. *See Rule 51, SCRCP.*

E. The trial court properly denied Wheeler's Motion for a New Trial under the "thirteenth juror doctrine."

The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990). In ruling on a new trial motion as the thirteenth juror, the trial judge may weigh the evidence and rely on his or her view of the circumstances. *See Fallon v. Rucks,* 217 S.C. 180, 60 S.E.2d 88 (1950). It is not necessary to justify the ruling with factual findings. *See Folkens v. Hunt,* 300 S.C. 251, 387 S.E.2d 265 (1990).

In reviewing the denial of a motion for a new trial under the thirteenth juror doctrine, appellate court considers only whether there is evidence to support the trial court's decision. *Haselden v. Davis*, 341 S.C. 486, 534, S.E.2d 295 (Ct.App. 2000). To reverse trial court's denial of motion for new trial under the thirteenth juror doctrine, appellate court must find the moving party was entitled to a directed verdict at trial. *Id.* The trial judge properly denied Wheeler's motion for a directed verdict.

In *Krepps by Krepps v. Ausen*, 324 S.C. 597, 479 S.E.2d 290 (Ct.App. 1996), the South Carolina Court of Appeals held a trial court may grant new trial absolute on grounds that the verdict is excessive or inadequate, but the jury's determination of damages is entitled to substantial deference. The Court further held a new trial absolute must be granted if the amount of verdict is grossly inadequate or excessive so as to shock conscience of court and clearly indicates the figure reached was result of passion, caprice, prejudice, partiality, corruption, or some other improper motive.

There is no evidence that the jury's verdict was a product of confusion, passion, prejudice, partiality, corruption, or some other improper motive. The evidence supports the jury's verdict against Wheeler in the amount of $252,798.00. Wheeler supposes and speculates the jury came to this final award by awarding $72,798 for past due rent and $180,000 for future rent. Regardless of the accuracy of this speculation, there is ample evidence to support the jury's analysis.

Sapp last received a rent payment under the Lease Agreement for September 2007. The rent at this time was approximately $6,618.00 per month. (R. p. 105, lines 14-16). The term of the Lease Agreement ran through September 2014. Sapp presented evidence that his total losses through May 2010 totaled over $191,000.00. This amount was based on actual rent received – the best and only true measure of the rental value of the property.

As previously stated, Sapp presented a separate analysis to the jury to project future damages for lost rent. Section 9.02 of the Lease which provides that damages for loss of future rental income shall be:

> "...the worth at the time of such termination of the excess, if any, of the amount of rent and charges equivalent to rent reserved in this Lease for the remainder of the stated term over the then reasonable

> rental value of the Leased premises for the remainder of the stated term."

Using Sapp's estimate of the "reasonable rental value," Plaintiff Sapp presented evidence that the total projected loss over the remaining term of the lease totaled nearly $303,000.00.

Sapp sought a total damage award against Wheeler in an approximate amount of $494,000.00. The jury returned a verdict against Wheeler for $252,798.00, or approximately 51% of the total damages Sapp sought in the case. These figures are not ones to shock the conscience of the court. The verdict is substantiated by the facts and is not excessive.

III. CONCLUSION

Based on the foregoing, Wheeler's appeal should be denied in full and the verdict should be affirmed. Sapp timely brought the action to enforce the guarantee. The verdict was not inconsistent. Even if it was, Wheeler has waived his right to object by failing to raise objections to the jury charges, to the verdict form, and to the damages' awards before the jury was discharged. The verdict was not excessive. It was not formed by passion or caprice or prejudice. Wheeler has presented no such evidence or reason to believe the jury was misguided. He simply does not like what the jury did. The verdict as to Wheeler was within the range of damages presented to the jury. The amount of the verdict was solely a function for the jury. The trial court's decision should be affirmed.

Dated this 16th day of April, 2012.

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 2008-CP-22-1345

J. Mars Sapp.....Respondent,

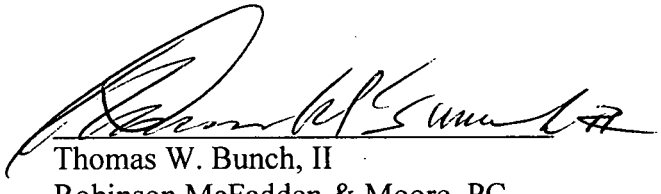
v.

Will D. Wheeler, P.I. Leasing & Management, Inc., Winston Kenneth Altman, II, and JDBD, LLC, ...Defendants,

Of whom Will D. Wheeler is the .....Appellant.

CERTIFICATION OF COMPLIANCE

The undersigned counsel for the Respondent hereby certifies that the Final Brief filed herewith complies with Rule 211(b) of the South Carolina Appellate Court Rules.



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PROOF OF SERVICE

I, Amy E. Lovette, the undersigned employee of Robinson McFadden & Moore, P.C., attorneys for the Respondent, do hereby certify that I have caused to be served a copy of Respondent's Final Brief on **April 16, 2012**, via hand delivery to the address below:

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