

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2014-CP-04-00214

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APR 20 2016

SC Court of Appeals

Wanda Gambrell, ... Respondent,

v.

Christopher A. Smith, ... Appellant.

BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF ISSUE ON APPEAL

Whether this Court should affirm when there is ample evidence supporting the circuit court's findings that Wanda Gambrell sold Appellant a lawful business, that Mrs. Gambrell did not misrepresent facts about the business, and that Appellant made no effort to learn the business before the sale.

STATEMENT OF THE CASE

This lawsuit is about an agreement to sell a bingo business. Appellant was the buyer and he drafted the parties' contract, but he failed to make all of the required payments to Wanda Gambrell, the seller, so Mrs. Gambrell filed this suit.

Appellant counterclaimed, and after a bench trial, the circuit court held in Mrs. Gambrell's favor. One could succinctly summarize the circuit court's reasoning by referencing the familiar adage "there is no such thing as a free lunch."

The "Bingo Tax Act" is contained in Title 12, Chapter 21, Article 24 of the South Carolina Code and explains the circumstances under which the game of bingo is not a lottery. Lotteries are criminalized elsewhere, in Chapter 19 of Title 16. One of the Bingo Act's many requirements is that the bingo game be conducted by a nonprofit organization. S.C. Code Ann. § 12-21-3930 (2014). Also, the game's "promoter" must possess a license. *Id.*

Wanda Gambrell began promoting and running bingo games for the Greenwood Shrine Club in February of 2010, under the name "Ma Cat's Bingo." (R.p.74, lines 12-14). In February of 2013, she agreed to sell the business to Appellant.

Appellant admitted drafting the parties' agreement, (R.p.141, line 21), which is not lengthy. The one-page contract explains what the sale does and does not include. (R.p.222). It also gives a purchase price of \$100,000. *Id.*

Ten thousand dollars was due at signing. The next payment—\$65,000—was due when Appellant received his license. Appellant was to pay the remaining \$25,000 in ten monthly installments of \$2,500. Again, the agreement specifies all of this. *Id.*

Mrs. Gambrell initiated this suit in February of 2014. (R.pp.13-16). Her complaint alleged Appellant only delivered two of the installment payments, leaving \$20,000 of the purchase price unpaid. (R.p.14, §§6-7).

Appellant answered and counterclaimed, alleging (among other things) that the parties' agreement was illegal, that Mrs. Gambrell used fraud to induce Appellant to enter into the contract, and that Mrs. Gambrell misrepresented information about the business before the purchase. (R.pp.19-22).

The circuit court conducted a bench trial in February of 2015. (R.p.38). Eight (8) witnesses testified, including Mrs. Gambrell and Appellant. (R.p.39).

Mrs. Gambrell's case was built on the parties' agreement, which she argued was clear. Mrs. Gambrell explained she even agreed to help Appellant apply for his license, (R.p.64, line 17 - p.65, line 3), and tried to facilitate his future success, going so far as to run the business from the time the parties agreed to the sale in February 2013 until Appellant received his license that June. (R.p.65, lines 4-15; p.72, lines 3-9).

Appellant's case matched the arguments outlined in his pleading and his appellate brief. He variously claimed it was illegal for Mrs. Gambrell to sell a "bingo business," that the Greenwood Shrine Club had no involvement with the business which made the operation a sham, and that Mrs. Gambrell repeatedly violated the law—hosting credit players as well as video poker machines. (R.pp.100-103). Appellant further claimed Mrs. Gambrell used

misrepresentations to induce him to enter the contract. (R.p.127, lines 6-25; p.146, lines 21-25). Appellant said he “rushed in” and recognized “very early on” he would not be able to run a profitable business. (R.p.126, line 4; p.156, lines 13-19).

Mrs. Gambrell said she generally ran the bingo in a lawful manner. She said her financial reports were fair and accurate, (R.p.70, lines 4-20), she said she explained the bingo business to Appellant, (R.p.65, line 8 - p.69, line 19), and she said Appellant never accused her of fraud until after she filed this suit, (R.p.73, lines 8-24), even though Appellant claimed he realized the deal was bad months earlier. (R.p.156, lines 13-19). Mrs. Gambrell admitted instances where Ma’s Bingo allowed credit players and exceeded the \$8,000 prize limit per session, but she said there were only a few of these and they had no material effect on the business’s earnings or the sales contract’s legality. (R.pp.89-91).

The circuit court issued its order about a month after the trial. (R.pp.4-6). The order granted Mrs. Gambrell’s request for relief, finding the contract was drafted by Appellant and was clear. (R.p.5, ¶1).

The order rejected Appellant’s counterclaims, which were breach of contract with fraudulent intent, conversion, and negligent misrepresentation. The court found no credible evidence Mrs. Gambrell made fraudulent misrepresentations. (R.p.5, ¶2). The court also found Appellant did not meaningfully investigate anything before agreeing to the sale even though Appellant admittedly knew nothing about running a bingo business. *Id.* The order additionally found Appellant failed to prove a negligent misrepresentation. (R.p.5, ¶4).

Appellant filed a timely motion to alter or amend, noting the court failed to rule on his claim the sales contract was illegal. (R.pp.30-34). The motion reiterated Appellant’s

theory Mrs. Gambrell sold him an illegal gambling operation with inaccurate records, sham contracts, and income derived from illegal bingo and video poker. (R.p.31).

The circuit court denied reconsideration, finding the evidence did not demonstrate Ma's Bingo was an illegal gambling operation. (R.p.7). The court repeated its previous findings about Appellant's lack of diligence as well as its view that the evidence did not demonstrate Mrs. Gambrell misrepresented any material facts. (R.pp.7-8).

ARGUMENT

The two claims—breach of contract and negligent misrepresentation—are at law. *Bivens v. Watkins*, 313 S.C. 228, 230, 437 S.E.2d 132, 133 (Ct. App. 1993) (negligent misrepresentation); *Moore v. Crowley & Assocs.*, 254 S.C. 170, 172, 174 S.E.2d 340, 341 (1970) (breach of contract). There is no separate claim for breach of contract accompanied by a fraudulent act. *Smith v. Canal Ins. Co.*, 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980).

As this Court is aware, appellate jurisdiction in an action at law “extends merely to the correction of errors of law.” *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). The circuit court's factual findings will not be disturbed unless no evidence reasonably supports them. *Id.* at 86, 221 S.E.2d at 775.

In light of that standard, there are three reasons this Court should affirm the circuit court's decision. First, there is “some evidence” that the sale of Ma's Bingo was lawful. Second, the circuit court's reasons for rejecting Appellant's counterclaims are similarly supported by the record. Finally, the circuit court's orders substantially comply with the requirement that the court state a basis for the result it reaches. This Court can ensure the law's faithful application. Again, this Court should affirm.

A. There is ample evidence the sale of Ma's Bingo was lawful and that the circuit court properly awarded Wanda Gambrell the remainder of the purchase price.

The standard of review only requires "some evidence" supporting the circuit court's decision, but there is ample evidence the sale of Ma's Bingo was lawful and that the circuit court properly awarded Wanda Gambrell the remainder of the purchase price.

Appellant drafted the parties' contract, (R.p.141, line 21), a contract the circuit court reasonably regarded as clear. The contract explains it does not include any real estate, it *does* include all furniture and equipment located inside the business, and the agreement's explanation of the purchase price is equally explicit. (R.p.222). The circuit court had an ample basis for concluding the purchase price was due: as the court's order articulates, the business and its assets were conveyed. (R.p.5, ¶1). Enforcing the payment provision required nothing more than following what the agreement says.

Appellant claims Ma's Bingo was an "illegal business," but nothing in the Bingo Tax Act supports such a broad proposition. The Greenwood Shrine Club hired Mrs. Gambrell as its "promoter," a role defined by statute as including an individual who is hired by a nonprofit to manage, operate, or conduct the nonprofit's bingo game. S.C. Code Ann. § 12-21-3920 (4) (2014). The Act contemplates "outside" promoters who are not a part of the nonprofit. The definition of "promoter" includes corporations and partnerships, which implies entities distinct from the nonprofit itself, *id.*, and a separate statute explains if the nonprofit does not contract with an "outside promoter," the nonprofit must designate one of its own members as the promoter. S.C. Code Ann. § 12-21-3955 (2014). *Of course* the Shrine Club had almost no hands on involvement with the bingo operation. The club hired

Mrs. Gambrell as the game's promoter to handle everything. The law seems to bless this exact scenario. Nothing about this structure appears unlawful.

There is also no authority supporting the idea that violations of the Bingo Tax Act would render the sales contract between Mrs. Gambrell and Appellant illegal. Appellant pointed to violations of statutes limiting the amount of prize money per bingo "session" and prohibiting discounted sales of bingo cards, see S.C. Code Ann. §§ 12-21-3990 (A)(1) and -4020 (2) (2014), but the Act contains its own enforcement mechanisms. One statute authorizes penalties of up to \$5,000 as well as license revocation, and a separate statute deals with license revocation in more detail. See S.C. Code Ann. §§ 12-21-4140 and -4280 (2014). Nothing indicates these violations, which Mrs. Gambrell claimed were few in number and had no material effect on the business's bottom line, would invalidate Mrs. Gambrell's contract with Appellant and transform the parties' agreement into an "illegal contract."

This case is also different from the cases Appellant cites, as any scrutiny of those cases will reveal. *Graham v. Graham* involved manipulating a judicial sale, a procedure previously declared illegal. 276 S.C. 341, 342-43, 278 S.E.2d 345, 346 (1981). *Jackson v. Bi-Lo* held one cannot sue for a breach of a contract obtained by bribery. 313 S.C. 272, 277-78, 437 S.E.2d 168, 171 (Ct. App. 1993). Ma's Bingo was not an illegal lottery—see *Nelson v. Bryant*, 265 S.C. 558, 220 S.E.2d 647 (1975) (raffle at county fair) and *Rountree v. Ingle*, 94 S.C. 231, 77 S.E. 931 (1913) (raffle run by furniture store)—and the bingo games Mrs. Gambrell ran did not involve gambling devices that are in and of themselves illegal. See *Ward v. West Oil*, 387 S.C. 268, 692 S.E.2d 516 (2010) (illegal "pull tab" machines); *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 601 S.E.2d 342 (2004) (video poker).

This was not illegal, it was straightforward. Appellant had to know he was taking a risk because bingo is regulated—he guessed he could get a license as well as the necessary agreements with the Greenwood Shrine Club. Those bets paid off: Appellant *got* a license and he *got* the contracts. (R.pp.223-225) (Lease agreement, promoter’s agreement, and authorizing Appellant to administer the bingo bank account). Two of those agreements conspicuously require Appellant to follow South Carolina law. (R.pp.224-225). The parties’ contract was not illegal. This Court should affirm the circuit court which held the same.

B. The reasons the court rejected Appellant’s counterclaims are also supported by the record: Mrs. Gambrell did not misrepresent anything, and Appellant made no effort to learn the business.

As with the previous issue, there is “some evidence”—indeed there is ample evidence—supporting the two reasons the circuit court gave for rejecting Appellant’s counterclaims. Those reasons were Mrs. Gambrell did not misrepresent anything and Appellant made no effort to learn the bingo business, a business he admittedly knew nothing about before the sale.

Evidence demonstrates Mrs. Gambrell’s business was successful. Tax records show the business profited \$3,000 in 2011, \$16,000 in 2012, and \$14,000 in 2013. (R.pp.226-228). Those numbers are modest, but Mrs. Gambrell was an employee of Ma’s Bingo as well as the promoter. In 2013, Mrs. Gambrell earned over \$55,000 in wages. (R.p.229). This was the year Appellant bought the business from Mrs. Gambrell, so these earnings reflect only 6 months of wages; from January of 2013 until June. Appellant claimed Mrs. Gambrell showed him a W-2 before the sale “that was right at a hundred thousand dollars.” (R.p.126, lines 7-9). That seems plausible and accurate, not false.

The Shrine Club profited too. The agreements in the record are identical to the agreements Mrs. Gambrell had with the club, (R.p.75, lines 6-8), and these agreements were approved by the State as part of the licensing process. See (R.p.75, lines 3-5; p.85, lines 9-12; p.96, line 23 - p.97, line 3) (relevant trial testimony); and S.C. Code Ann. §§ 12-21-3940(A)(7) and -3950(A)(2) (2014) (relevant statutes). The promoter's agreement explains net revenue from bingo is to be delivered to the Shrine Club on a quarterly basis. (R.p.224). The club paid Mrs. Gambrell as the bingo game's promoter, but the agreement nevertheless outlines a structure where the club profits when the bingo profits.

And net profit was not the club's primary source of money. The club received money directly from the State. As explained in the solicitor's contract, (R.p.225), and the relevant statute, see S.C. Code Ann. § 12-21-4190 (2014), the Shrine Club was entitled to a percentage of the taxes the law imposes on the sale of bingo paper. As multiple witnesses explained at trial, the Shrine Club received its money from the Department of Revenue. (R.p.55, lines 24-25; p.68, line 20 - p.69, line 9; p.114, lines 18-23).¹

Mrs. Gambrell said she explained all of this to Appellant. Again, this business is regulated extensively and requires a lease between the nonprofit and promoter, see § 12-21-3940(A)(7), and mandates a special bank account for all funds derived from bingo. S.C. Code Ann. § 12-21-4090 (C) (2014). Mrs. Gambrell explained she showed Appellant the contracts she had with the Shrine Club and he had no questions. (R.p.65, line 8 - p.69, line 19; p.84, line 22 - p.85, line 8). This supports the finding of no misrepresentation.

¹The solicitor's contract and the statute appear to describe the Shrine Club's percentage differently, but this was not a point of discussion at trial, and because the Shrine Club's distribution is dictated by statute, any discrepancy would seem to be immaterial.

To be fair, Appellant's story is different. He says Mrs. Gambrell made it sound as though he was assured to make money. The lease obligated the Shrine Club to pay Appellant \$5,000 per month in rent, (R.p.223), and the promoter's agreement obligated the Shrine Club to pay him \$5 per person and 5% of the gross revenues from bingo. (R.p.224). Appellant says he was told this money was guaranteed, (R.p.126, line 13 - p.127, line 2), and his partner, who ultimately put up all of the cash Appellant paid Mrs. Gambrell, explained Appellant described it precisely that way to her. (R.p.199, line 13 - p.200, line 18).

Here again, there is evidence supporting the circuit court's decision to reject this narrative. At trial, Mrs. Gambrell explained the bingo must be profitable in order for the promoter to reap the benefit of those agreements because all of the payments in question—the money for the lease as well as the promoter's fees—come out of the bingo bank account. See (R.p.65, line 20 - p.66, line 20). Appellant admitted he had no experience with bingo and “went into Wanda's bingo two or three times during the negotiating period, but other than that, I knew nothing about it.” (R.p.122, line 21 - p.123, line 3). And even if this evidence did not exist, the idea of “guaranteed money” would still be hard to swallow. Nobody could reasonably expect the Greenwood Shrine Club to subsidize a bingo operation that was not profitable. The business world rarely gives an investor something for nothing. As the saying goes, there is no such thing as a free lunch.²

Appellant frequently referenced video poker during the trial as well as the way Mrs. Gambrell ran the business. He claimed these supported both misrepresentation and illegality.

²*Citadel Dev. Found. v. Greenville Cty.*, 279 S.C. 443, 447 n.1, 308 S.E.2d 797, 800 n.1 (Ct. App. 1983) (Sanders, C.J.).

Video poker is plainly illegal, but Appellant explained at trial that the purpose of eliciting testimony about whether Mrs. Gambrell profited from any video poker machines was to impeach Mrs. Gambrell's credibility. (R.p.87, line 10 - p.88, line 7). That is different than Appellant's substantive argument—Appellant claims he removed four video poker machines, banned “house” players, ceased going over the prize limit, and then realized it was not possible to make any money in bingo. See (R.p.138, line 14 - p.139, line 1).

And some Appellant's own witnesses contradicted this version of events.

One witness estimated there were about 7 of these “house” players and agreed that because an average weekend night involved 150 or 200 people playing bingo, the house players would not affect income and revenues. (R.p.164, lines 3-20; p.172, line 8 - p.173, line 19). Another of Appellant's witnesses gave similar testimony. (R.p.186, lines 4-23).

Appellant did not actively work at the bingo business, as Mrs. Gambrell had done. He explained he had employees to do that, he was only at the business maybe 5 hours a week after the first month, and while he originally retained most of Mrs. Gambrell's employees, only 2 of those employees remained after the first couple months. (R.p.149, line 3 - p.150, line 18). He denied receiving complaints about rude employees but then said “[e]verybody complains about some bingo.” (R.p.150, line 21 - p.151, line 5).

Appellant's partner eventually became an employee in order to “get her money out,” but she had no experience in bingo and was “overwhelmed.” (R.p.205, line 17 - p.206, line 10). Appellant operated the bingo for 11 months—from June of 2013 until May of 2014, see (R.p.135, lines 17-19; p.177, lines 17-22)—even though he claimed he quickly realized it was impossible to make money. In the end, Appellant sold the business's equipment for

\$50,000 to a third party who “owns several bingos.” (R.p.203, line 17 - p.204, line 14). This further undermines the theory one cannot operate a profitable bingo without violating the law.

This version of events is admittedly one-sided, but these orders were entered following a trial, and the standard of review requires upholding the circuit court’s decision unless there is no evidence supporting the court’s decision. *Townes*, 266 S.C. at 86, 221 S.E.2d at 775. There is no such deficiency here. The Court should affirm.

C. **Though the circuit court’s orders are short, they comply with the requirement that the court state a basis for the result it reaches so this Court can ensure the law was faithfully applied.**

Rule 52(a), SCRCP, provides a circuit court shall list its findings of fact and conclusions of law. The Supreme Court has explained “where a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court’s judgment for lack of an explicit or specific factual finding.” *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 131, 568 S.E.2d 338, 342 (2002) (quoting *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 123 (1991)).

The circuit court’s orders are not lengthy. The original order is three pages long. (R.pp.4-6). The order denying reconsideration is two pages long. (R.pp.7-8). The first order specifically lists findings of fact and conclusions of law, and both orders state the basis for the result the court reached. The court believed the evidence did not demonstrate Ma’s Bingo was an illegal gambling operation, the court believed the greater weight of the evidence did not show any material misrepresentation by Mrs. Gambrell, and the court believed the evidence showed Appellant did not understand the bingo business or investigate

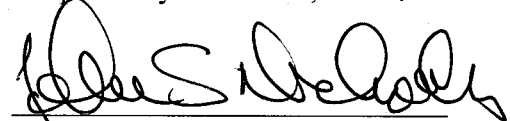
it prior to the sale. These are different than the deficient order in *Luckabaugh*, which recited a legal conclusion without offering any supporting facts. *Id.* at 131, 568 S.E.2d at 342. There, the Supreme Court was left to speculate how the lower court reached the conclusion *Luckabaugh* was not a sexually violent predator. *Id.* at 133-34, 568 S.E.2d at 343-44. Here, we know the circuit court believed the contract was clear, Mrs. Gambrell did not misrepresent anything, and Appellant did not investigate the bingo business in any detail before he bought one.

CONCLUSION

Appellant believed his contract with the Greenwood Shrine Club gave him guaranteed money, but the circuit court acted reasonably in rejecting this argument as well as the argument that the underlying contract, which Appellant admitted drafting, was illegal. There is "some evidence" supporting the circuit court's findings. This Court should affirm.

April 18, 2016

Respectfully submitted,



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Robin B. Stilwell, Circuit Court Judge

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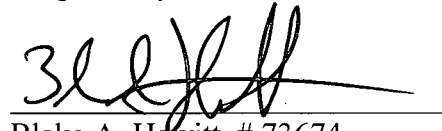
Christopher A. Smith, ... Appellant.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Respondent* complies with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

April 20, 2016

Respectfully submitted,



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