

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No.: 2016-000667
Common Pleas Case No.: 2013-CP-40-02443

RECEIVED

SEP 26 2016

SC Court of Appeals

Timothy E. Bookert, Jr.

Respondent,

v.

South Carolina Department of
Mental Health, and South Carolina
Treasurer's Office

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. The trial court did not err in denying the Appellants' JNOV and New Trial Motion on the existence of a bailment as the evidence presented at trial fully supported the existence of a bailment between Respondent and Aaron Kennedy.

2. The trial court properly allowed the Respondent to testify to the terms of the bailment, specifically the amount of the money involved.

3. The trial court properly upheld the jury's verdict that the funds were lawfully possessed by the Appellant.

4. The trial court did not abuse its discretion in rejecting the Appellants' requested jury charges as they were not supported by the evidence.

5. The trial court did not abuse its discretion in failing to grant a new trial due to alleged prejudicial comments made by Respondent in closing argument.

STATEMENT OF THE CASE

The Respondent, Timothy E. Bookert, filed a civil suit against the South Carolina Treasurer's office and the South Carolina Department of Mental Health (hereafter DMH) on April 23, 2013. The Respondent alleged that the Appellants committed conversion and trover, as well as tortious interference with contract, breach of implied constructive bailment, and tortious interference with personal chattels. The complaint also requested punitive damages, costs, and any additional relief the trial court deemed appropriate. Respondent claimed he was entitled to damages from the Appellants in the stipulated sum of \$208,700.00.

The Appellants filed their answer on May 24, 2013. The Appellants denied that Respondent was entitled to relief and averred that the complaint should be dismissed for failure to state facts sufficient to constitute a cause of action, that the claims were barred by the equitable doctrine of unclean hands, that the claims were barred to the extent the funds were acquired through illegal means, that there were no damages in this case, that the claims were barred by the South Carolina Tort Claims Act, that Respondent was barred from bringing his claims as he relinquished possession of the funds at issue to DMH, and that the claims were barred because the Appellants had acted in good faith.

The parties engaged in discovery, including the exchanging of documents and answers to interrogatories. Also, the Appellants deposed the Respondent.

Both parties filed motions for summary judgment. The Appellants filed a motion to compel. The Respondent filed a motion regarding spoliation of evidence.

On June 5, 2014, the motions were heard by the Honorable Alison Renee Lee. On March 26, 2014, the circuit court issued an order denying both party's motions for summary judgment. However, the circuit court granted, in part, the Appellants motion to compel.

The parties proceeded to trial on November 30, 2015, before a jury and the Honorable Alison Renee Lee. On December 3, 2015, the jury returned a verdict in favor of the Respondent in the amount of \$208,700.00.

The Appellants filed a timely motion for a judgment notwithstanding the verdict (JNOV) pursuant to Rule 50(b), or, in the alternative, Motion for New Trial Absolute (based on the Thirteenth Jury Doctrine) pursuant to Rule 59, SCRCP. The trial court denied the Appellants' motions via written order dated February 29, 2016.

The Appellants filed a Notice of Appeal on March 29, 2016. This appeal follows.

STATEMENT OF FACTS

The Respondent, Timothy Bookert, testified that he got a job working for the South Carolina Department of Mental Health (hereafter DMH) sometime in 1997 or 1998. He worked for DMH until November 2011. Tr. p. 163. At all times relevant to this matter, Bookert lived in the Columbia, South Carolina area. Tr. p. 161.

Bookert testified that he was working in the supply room at a large Columbia DMH facility located at 220 Harden Street in May-April 2011. He was working as a “supply specialist #2.” Tr. pp. 163-4; Tr. 191-3. Bookert said he did not work directly with patients. He worked in the supply room and would take supplies over to various wards as orders were faxed to the supply room. Tr. pp. 192-3.

Sometime in late May or early April 2011, Bookert came into possession of a large amount of money. Tr. p. 164. He testified that the money was given to him by a friend for safekeeping. The friend is Aaron Kennedy. Tr. p. 165. Bookert testified that he had known Kennedy for 7-8 years. He testified that he met Kennedy at auto races in Darlington and other places. Kennedy and Bookert enjoyed going to automobile races. On occasion, Bookert and Kennedy would go to a bar or restaurant after a race. Tr. pp. 164-168.

Bookert believed that Kennedy was in the construction business, in particular, he believed Kennedy “poured concrete.” Tr. p. 169-171. Bookert believed this because when he saw Kennedy’s truck at the racetrack it contained equipment for working with concrete. *Id.*

About 2-3 weeks prior to April 25, 2011 -- the date on which the primary incident occurred which gave rise to this case -- Kennedy came to Bookert’s home driving the truck with which Bookert was familiar. Tr. p. 170-1. Kennedy had called and told Bookert he was

coming to visit him. When Kennedy arrived he came to Bookert's front door and was alone. Kennedy had a brown box, about one foot long and one foot wide with no markings. Tr. pp. 172-4. Kennedy came into Bookert's home, the two men walked to the kitchen table, sat down, placed the box on the table, and had a conversation regarding the contents of the box. Kennedy told Bookert that the box contained money, and that Kennedy wanted to leave the money with Bookert. According to Bookert, Kennedy indicated that he was "going away for a little bit." Tr. pp. 176-7. Bookert understood this to mean that Kennedy was going to prison; however, Kennedy never actually mentioned "prison." Tr. pp. 179-80. According to Bookert, Kennedy said that the box contained \$210,000.00 in cash.¹ Kennedy gave Bookert \$500.00 of the cash on the spot and told Bookert that he would "compensate" him for safekeeping the money while Kennedy was away. Tr. pp. 176-7. Bookert testified that he understood this to mean that Kennedy would give him some of the cash if Bookert took care to keep the money safe until Kennedy's return. Tr. p. 178-80.

Bookert went on to describe how the money was contained in the box: it was in two separate Crown Royal bags. Tr. p. 181-2. He tried to hide the money in his house, and checked on it every day. Tr. pp. 183-5. He kept the money hidden in his home under the night stand for about two weeks. *Id.* However, Bookert became concerned that the money might be found. Tr. pp. 186-8. Eventually, Bookert moved the money into a bottom drawer in the night stand. *Id.* At this time, Bookert removed the money from the box and disposed of the box. Tr. pp. 188-9.

Eventually, Bookert became so concerned about the money being in his house that he resolved to move it to a safer location. He decided to take it to work. Bookert explained

¹ Prior to trial the parties stipulated that the actual amount of the funds was \$208,700.00. Stipulation of parties as to funds.

in detail his decision to take the money to his workplace. He testified that he took it to work about one week prior to April 25, 2011. Tr. pp. 190-1.

Bookert took the money to work on Monday April 25, 2011. Tr. pp. 193-4. He went to work early that day, around 7:30am. Bookert testified that he “wanted to make sure that there was no one else inside the building when I was there, or if it was, it would probably just be a supervisor that would be in his office, and there wouldn’t be any one in the supply room where I planned on putting the money.” Tr. p. 194. Normal working hours were 8-4:30. Tr. p. 195. The building in question is a supply building and does not house patients. Tr. p. 194. In addition, the DMH buildings have their own security, and few workers are in the buildings during the day. Bookert believed the money would be safer hidden at work than at home. The security guards did not regularly enter the storage room where Bookert hid the money. Tr. pp. 194-6.

Bookert brought the money to work in two plastic grocery bags which he placed on the front seat of his car beside him. He had discarded the Crown Royal bags. Bookert was trying to avoid his co-workers and took the bags of money to the “smaller supply room.” Tr. pp. 197-8. Once in the small supply room Bookert found two empty Duracell battery boxes, of the type normally kept in the supply room, and he placed the bags with the money in the Duracell battery boxes. Tr. pp. 198-9. Bookert described the small supply room in detail in an effort to show why he believed it was a safe hiding place. Tr. pp. 198-207. The room was always locked. Only Bookert and a few other co-workers had keys. Bookert carefully pushed the two Duracell battery boxes containing the money well under a bottom most shelf where no other supplies or items were stored. This was well out of sight. Someone would

have to get down on their hands and knees and bend over to see under the bottom shelf and notice the battery boxes. Bookert checked on the boxes regularly each day. *Id.*

On April 25, 2011, about a week after placing the boxes with the money in the small supply room, Bookert arrived to work as usual at about 8:00am. Tr. pp. 206-7. Later in the afternoon, on April 25, 2011, Bookert was working in the "big supply room" Tr. p. 208. Bookert's supervisor, Thomas Johnson, came into the big supply room where Bookert was working and "he looked at [Bookert]. He said Lindsey just found some money up the hall, and I looked at him and I said that belongs to me." Tr. p. 209. Bookert and Johnson then went straight to Johnson's office.

Upon arrival at Thomas Johnson's office, a DMH security officer and Lindsey Johnson were already present. The two Duracell battery boxes were on Thomas Johnson's desk, the grocery bags containing the money were open, and the money was exposed. Tr. pp. 210-1. Bookert immediately told everyone in the room that the money was his, it had been given to him by a friend, and the amount of the money (\$210,000.00). Tr. pp. 212-4. Bookert was allowed to return to the big supply room and continue his work. Tr. p. 215.

Shortly thereafter, other DMH security officers transported Bookert to the "headquarters of DMH public safety." Tr. p. 216. Bookert testified that at no time was he handcuffed, informed he was under arrest, and he never felt like he was under arrest. Tr. 216-7. He was taken to DMH headquarters on Farrow Road, to the Crafts-Farrow Building. *Id.* Upon arrival, Bookert sat in the public lobby of the building and waited. He was taken to another room where he met two SLED agents. The SLED agents questioned Bookert about the events that occurred earlier that day. Bookert testified he never felt like he was under arrest while at DMH headquarters. Tr. pp. 217-9. He was questioned for 30-40

minutes by SLED agents and told them basically the same story he testified to at trial. Tr. pp. 219-21; and Plaintiff's exhibit #1. Bookert left after the interview and returned to the supply building where he worked shortly after 5:00pm. Tr. p. 224. He was never taken into custody.

Bookert continued to work for DMH until November 2011, for approximately six months after the money was found. During this six months he continued doing the same job. No one ever discussed the incident regarding the money with him again. No one ever told him he would be arrested. Tr. pp. 224-5. From April 25, 2011, until the date of the trial in this matter, November 30, 2015, Timothy Bookert was not arrested or charged, nor was any of his property searched on account of this incident.

Bookert was subject to intense and lengthy cross examination. Tr. pp. 228-316. His co-workers, Lindsey Johnson and Thomas Johnson, basically confirmed Bookert's testimony to the extent of their involvement. Tr. pp. 74-119.

SLED agent Donald Dorsey and FBI agent Jason Greenan were called to testify regarding their efforts to locate Aaron Kennedy. SLED agent Dorsey was one of two SLED agents who interviewed Bookert on the afternoon of April 25, 2011. SLED agent Dorsey confirmed that Bookert was never placed under arrest. He also confirmed that Bookert told the agents that he had gotten \$210,000.00 from Aaron Kennedy. Tr. pp. 416-7. SLED agent Dorsey had also searched for Aaron Kennedy in several computer databases: the South Carolina Department of Corrections database, the Federal Bureau of Prisons database, and CLEAR, a database operated by a private company. Tr. pp. 418-22. Dorsey confirmed that all of these databases are freely available to the public. *Id.* He also confirmed that neither the Bureau of Prisons database nor the South Carolina Department of Corrections database

would locate inmates in facilities in states other than South Carolina, U.S. territories, or foreign nations. *Id.* Databases of 49 other states and U.S. territories were not checked. *Id.* As regards "CLEAR," Agent Dorsey could not confirm its reliability, nor confirm how it collected data for its database. Tr. pp. 421-2. FBI Agent Greenan also relied on the same databases. Tr. pp. 446-7.

Lastly, FBI agent Greenan also testified regarding a federal investigation into one Devin Sistrunk. Tr. pp. 444-6; and Defense exhibits 16 and 17. These exhibits refer to the federal drug charges against Mr. Sistrunk, and a federal forfeiture as to his interest in property. However, none of the documents implicate the Respondent in any way, nor do they show that any interest in any property owned by the Respondent was forfeited. Exhibits 16 and 17.

ARGUMENT 1

The trial court did not err in denying the Appellants' JNOV and New Trial Motion on the existence of a bailment as the evidence presented at trial fully supported the existence of a bailment between Respondent and Aaron Kennedy.

The trial court properly denied the Appellants' post-trial motions. The Respondent testified at length as to a bailment between himself and Aaron Kennedy. Thus, there was ample evidence in the record to support the verdict and judgment. The Appellants' argument is little more than a summary of their presentation before the jury.

(1) Standard of Review and Law:

(a) Post-Trial Motions

In *RFT Management Co., L.L.C. v. Tinsley & Adams L.L.P.*, 732 S.E.2d 166, 331-4 (S.C. 2012) the Supreme Court set forth the standard to be applied in motions of this type, both JNOV motions and motions under the Thirteenth Juror Doctrine.

Regarding JNOV, directed verdict, and new trial motions the Court held:

When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994). Moreover, "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). **An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below.** *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000). **In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.** *Id.* at 300, 536 S.E.2d at 419.

Id. at 332-3 (emphasis added). See also, *Allegro Inc. v. Scully*, __ S.E.2d __, 2016 WL 4474336 (S.C. 2016); *Welch v. Epstein*, 536 S.E.2d 408, 418-9 (S.C. Ct. App. 2000) (Neither trial nor appellate court has authority to weigh credibility of the witnesses in ruling on a directed verdict, JNOV, or new trial motion.); and *Creech v. South Carolina Wildlife and Marine Resources Dept.*, 494 S.E.2d 571 (S.C. 1997) (same).

Regarding the Thirteenth Juror Doctrine the *RTF Management* Court held:

[T]he thirteenth juror doctrine is a vehicle by which the trial court may take its own view of the evidence and grant a new trial if it disagrees with the jury's verdict. *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990). This is also called granting a new trial upon the facts, and the judge is not required to give the reasons for its ruling. *Id.* at 254, 387 S.E.2d at 267. The effect is the same as if the jury had failed to reach a verdict. *Id.* **A trial court's order granting or denying a new trial upon the facts will not be disturbed unless the decision is wholly unsupported by the evidence or the conclusion reached is controlled by an error of law.** *Id.* at 254-55, 387 S.E.2d at 267. "The granting of a new trial upon the facts is not the equivalent of granting a directed verdict." *McEntire*, 353 S.C. at 632, 578 S.E.2d at 748. The question of whether the evidence is legally sufficient to sustain a verdict, a question of law, is distinguishable from the question of whether a fair preponderance of the evidence supports a verdict, which is a matter involving the exercise of discretion. *Id.* at 632-33, 578 S.E.2d at 748. Stated another way, a party's evidence might make a case one for the jury, but the evidence might be so outweighed by the countervailing evidence that, in the exercise of its discretion, a trial court could choose to set aside the verdict under the thirteenth juror doctrine. *Id.* at 633, 578 S.E.2d at 748 (citing *Russell v. Pilger*, 113 Vt. 537, 37 A.2d 403, 414 (1944)).

RTF Management, 732 S.E.2d at 334 (emphasis added).

(b) Bailment

One of the principle cases on bailment in South Carolina is *Hadfield v. Gilchrist*, 538 S.E.2d 268 (S.C. Ct. App. 2000).

A bailment is created by the delivery of personal property by one person to another in trust for a specific purpose, pursuant to an express or implied contract to fulfill that trust. 8A Am.Jur.2d *Bailments* § 1 (1997). See *Home Indem. Co. v. Harleysville Mut. Ins. Co.*, 252 S.C. 452, 460, 166 S.E.2d

819, 824 (1969) (“Bailment has been defined as the delivery of a chattel for some express or particular purpose upon a contract, express or implied, that, after the purpose has been fulfilled, then the chattel shall be redelivered to the bailor, or otherwise dealt with according to his directions.”).

Id. at 272. In addition, the bailment may be formal or informal, no specific words or acts are necessary, and it may be in writing or oral. 8A Am. Jur. 2d Bailments § 33. See also 8 C.J.S. Bailments § 27.

(c) Conversion

“Conversion” is defined as the unauthorized assumption and exercise of the rights of ownership over goods or personal chattels belonging to another, to the alteration of their condition or to the exclusion of the rights of the owner. *Green v. Waidner*, 284 S.C. 35, 37, 324 S.E.2d 331, 333 (Ct.App.1984). See *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 496, 220 S.E.2d 116, 119 (1975) (Conversion may arise by the illegal detention of another's property.). “There can be no conversion of money unless there is an obligation on the defendant to deliver a specific, identifiable fund to the plaintiff.” *Richardson's Rests., Inc. v. Nat'l Bank of S.C.*, 304 S.C. 289, 294, 403 S.E.2d 669, 672 (Ct.App.1991). Money, however, may be the subject of conversion if “it is capable of being identified and there may be conversion of determinate sums even though the specific coins and bills are not identified.” *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 498, 392 S.E.2d 789, 792 (1990).

Mullis v. Trident Emergency Physicians, 570 S.E.2d 549, 550-1 (S.C. Ct. App. 2002). See also, *SSI Medical Services v. Cox*, 392 S.E.2d 789, 792-3 (S.C. 1990) (trover and conversion); and *Owens v. Andrews Bank & Trust Co.*, 220 S.E.2d 116, 119 (S.C. 1975) (same).

(2) *Analysis:*

The entire thrust of Appellants' argument is that the Respondent's case is not credible. Appellants' brief pp. 8-14. In fact, Appellants' argument in this respect is little more than a summary of their case as presented to the jury.

The trial court completely rejected the Appellants' arguments in its post-trial order of February 22, 2016. Post-trial order of trial court denying Appellant's post-trial motions, pp. 1-11. The post-trial order of the circuit court addresses each and every one of Appellants arguments as regards this issue and finds them wanting. *Id.* Specifically, as regards bailment and conversion the trial court properly noted Respondent's testimony. *Id.* at pp. 5-6. Respondent testified at length concerning how he came by the money and why he chose to conceal it at his place of work. Respondents Statement of Facts, *supra*. and Tr. pp. 161-331. The Respondent's testimony was sufficient to support a bailment and the cause of action for a conversion. Thus, there is more than sufficient evidence in the record to sustain the verdict and judgment.

Appellants completely overlook the law as set forth above. In ruling on motions for directed verdict and JNOV, the trial and appellate courts must view the evidence and all reasonable inferences that can be drawn therefrom in the light most favorable to the party opposing the motions

. *RTF Management, supra*. In addition, when ruling on these kinds of motions, "neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *RTF Management, 732 S.E.2d at 333* and *Allegro Inc., supra*. The Appellants ignore this aspect of the law in its entirety in their brief.

Because the Appellants' entire argument is a disputation on the credibility of the Respondent and the Respondent's case, it must fail as a matter of law. The jury decided this issue after hearing the evidence. The jury rejected the very same arguments that the Appellant is now making to this Court. Tr. pp, 538-53.

The Respondent submits that this Court should reject Appellants' argument and affirm the verdict and judgment below.

ARGUMENT 2

The trial court properly allowed the Respondent to testify to the terms of the bailment, specifically the amount of money involved.

As between the parties to a contract or bailment, the terms are frequently deemed verbal acts, and, therefore, non-hearsay. The words themselves are operative and bring about legal change and consequences. As such, the trial court did not abuse its discretion by permitting the Respondent to testify concerning the bailment/contract as the Respondent was the other party to this legal arrangement. In any event, the Respondent testified that the amount of money involved was \$210,000.00; however, the Appellants and the Respondent stipulated at trial that the actual amount of money at issue was \$208,700.00. Thus, even if the trial court committed error in this regard it is difficult to see how it is not harmless error. Stipulation as to the amount of money.

(1) Standard of review and Law:

(a) Evidentiary Rulings

Rulings on evidentiary matters by a trial court are subject to an abuse of discretion

standard of review.

As a general rule, the admission of evidence is a matter addressed to the sound discretion of the trial court. *Gamble v. Int'l Paper Realty Corp. of South Carolina*, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996); *Hofer v. St. Clair*, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989); *R & G Constr., *242 Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct.App.2000). On appeal, therefore, this Court will not disturb a trial court's evidentiary rulings absent a clear abuse of discretion. *Id.* at 439, 540 S.E.2d at 121; *Elledge v. Richland/Lexington School Dist. Five*, 352 S.C. 179, 185, 573 S.E.2d 789, 792 (2002); *see also Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005) (observing admission of evidence will not be reversed absent an abuse of discretion). The trial judge's decision will not be reversed on appeal unless it appears he clearly abused his discretion and the objecting party was prejudiced by the decision. *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 548 S.E.2d 880 (Ct.App.2001); *Sullivan v. Davis*, 317 S.C. 462, 454 S.E.2d 907 (Ct.App.1995). "For this Court to reverse a case based on the admission of evidence, both error and prejudice must be shown." *Stevens v. Allen*, 336 S.C. 439, 448, 520 S.E.2d 625, 629 (Ct.App.1999) (citing *Timmons v. South Carolina Tricentennial Comm'n*, 254 S.C. 378, 175 S.E.2d 805 (1970)).

Seabrook Island Property Owner's Ass'n v. Berger, 616 S.E.2d 431, 434 (S.C. Ct. App. 2005). This rule clearly applies to hearsay testimony. *State v. Byers*, 710 S.E.2d 55 (S.C. 2011).

(b) Hearsay/Bailment/Contract

The testimony complained of here concerned the terms of a bailment/contract, specifically the value of the funds which were the subject of the bailment. However, statements, admissions, and declarations by the parties to a bailment are admissible. 8A Am. Jur. 2d Bailments § 227. As noted previously, the bailment may be formal or informal, no specific words or acts are necessary, and it may be in writing or oral. 8A Am. Jur. 2d Bailments § 33. See also 8 C.J.S. Bailments § 27. Likewise, the terms of a bailment may fall into that category of non-hearsay known as "verbal acts." This "is a category of non-hearsay designated as verbal acts or verbal conduct in which the utterance of the words is,

in itself, an operative fact which gives rise to legal consequences” 29 Am. Jur. 2d Evidence § 675.

There is a class of statements to which the law attaches legal consequences. **The making of such statements creates legal rights, duties, obligations, or responsibilities, or may satisfy legal duties, obligations, or responsibilities.** These statements have legal significance entirely apart from the truth of the matters asserted. Such statements are not hearsay when offered for their legal consequences rather than for their truth.

The term “verbal acts” is applied to this class of statements. Oral or written expressions of offer and acceptance, or the exchange of promises that create a contract are examples. The dispositive provisions of a will are verbal acts, although statements of fact in a will may be hearsay. Statements made by the parties to a conspiracy in forming that conspiracy are verbal acts. Statements made in an attempt to corrupt a juror or intimidate a witness are verbal acts. A statement giving notice is a verbal act, and in a case in which it is relevant whether a party had received notice, evidence of the statement containing the notice is not hearsay. Instructions may be verbal acts.

The term “verbal act” also applies to statements that accompany conduct and explain the intent of that conduct. Thus, when a person delivers property to another, statements accompanying that transaction may be verbal acts defining the transaction as a gift, a loan, a **bailment**, or as a conditional or unconditional transfer of the property.

1 West's Pa. Prac., Evidence § 801-2 (4th ed.). ACCORD, 29A Am. Jur. 2d Evidence § 877. “A contract is a **verbal act** that has a legal reality independent of the truth of any statement contained in it.” 17A Am. Jur. 2d Contracts § 1 (emphasis added). “Words of a contract, often characterized as ‘**verbal acts**,’ are non-hearsay, as they have independent legal significance, and the law attaches duties and liabilities to their utterance.” 23 C.J.S. Criminal Procedure and Rights of Accused § 1195 (emphasis added). “Verbal acts do not fall within the hearsay rule” 31A C.J.S. Evidence § 371.

(2) *Analysis:*

The trial court did not abuse its discretion in permitting the Respondent to testify as to the amount at issue in the bailment.

First, the Appellants have totally failed to demonstrate an abuse of discretion, much less prejudice.

Second, the testimony in question was without a doubt a verbal act and, thus, non-hearsay. The Respondent testified to a bailment/contract he had with Aaron Kennedy. This testimony is covered by the verbal acts doctrine set forth above.

Third, even if there was error, it was harmless. The Appellants stipulated to the jury that the amount in question was \$208,700.00. Where is the prejudice?

Fourth, Appellants' reliance on *Deep Keel, LLC v Atlantic Private Equity Group, LLC*, 773 S.E.2d 607, 614 (S.C. Ct. App. 2013) is utterly misplaced. The individual in *Deep Keel* who offered hearsay testimony -- Bynum -- was **not** personally a party to any contact to which he testified. Bynum was **not** testifying to his contract but to someone else's contract. *Deep Keel* is not on point. The Respondent, by contrast, testified to a bailment contract which he actually had with another person, Aaron Kennedy. Tr. pp. 165-181.

Thus, the testimony, even if error, was harmless. *LaSalle Bank National Ass'n v. Davidson*, 688 S.E.2d 121, 123 (S.C. 2009).

For all of the foregoing reasons, the Appellants' arguments are without merit and should be denied. The verdict and judgment of the trial court should be affirmed.

ARGUMENT 3

The trial court properly upheld the jury's verdict that the funds were lawfully possessed by the Appellant.

The Appellants essentially argue that they were entitled to a directed verdict on an assortment of offenses which they persuaded the trial court to charge the jury. None of these offense were actually brought as criminal charges against the Respondent. They include three state crimes and two federal crimes with which the Respondent was never charged in connection with this matter. The crimes charged were S.C. Code Ann. §§12-54-44(B)(6)(c), 44-53-475, and 16-13-180(A). In addition, the trial court charged two federal offenses: 26 U.S.C.A. §6867(a) and 1956(a)(3). The Respondent maintains that there was absolutely no evidence whatsoever adduced at trial to establish these criminal offenses as to Respondent. The Respondent vigorously opposed the jury instructions on these offenses at trial.

This argument by Appellants is little more than a thinly veiled effort to reargue their position as set out in Arguments 1 and 2. See Appellants' brief. All of this was thrashed out – improperly as these crimes should not have been charged – before the jury which totally rejected the Appellants' contentions. As such, Respondent would refer this Court to his Arguments 1 and 2, supra.

Appellants' arguments are without merit and should be denied and dismissed. The Verdict and judgment below should be affirmed.

ARGUMENT 4

The trial court did not abuse its discretion in rejecting the Appellants' requested jury charges as they were not supported by the evidence.

The trial court did not abuse its discretion in refusing to charge the jury "on the state and federal tax statutes and the state statute prohibiting receiving stolen goods." Appellants' brief p. 16. No evidence was presented to establish the Respondent's guilt of these crimes. At trial, the Appellants forgot or ignored the fact that this was a civil trial and not a criminal prosecution. The Respondent was never criminally charged with any of these crimes.

(1) Standard of Review:

An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion." *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." *Id.* An erroneous jury instruction will not result in reversal unless it causes prejudice to the appealing party. *Id.* at 405, 663 S.E.2d at 33; *see also Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000) ("When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues."). "A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial." *Cole*, 378 S.C. at 404, 663 S.E.2d at 33.

Berberich v. Jack, 709 S.E. 2d 607, 611 (S.C. 2011). *See also Carson v. CSX Transp., Inc.*, 734 S.E.2d 148, 152 (S.C. 2012).

(2) Analysis:

It must be remembered that the Respondent was not criminally charged with any of these offenses. Despite the passage of more than 4 years from the time the money was first found at DMH on April 25, 2011, until the day of this trial on November 30, 2015,

none of these charges were brought against the Respondent. As concerns the claim that the Respondent was in violation of the tax code, what witnesses did the Appellants bring forth to prove this? One of the Appellants was the State Treasurer's Office; however, no one from the Treasurer's Office testified regarding any matter during the trial. No one was called from the South Carolina Department of Revenue to testify as to Respondent's taxes or what he might owe. Furthermore, the Appellants refused to concede at trial that Bookert had ever actually possessed the funds in question, much less brought them to DMH on April 25, 2011. The Appellants contested and still contest Respondent's account at every point.

What taxes does Bookert owe on money that he only had for approximately 4 weeks at the most? The Appellants seized the funds on April 25, 2011, and have maintained possession until this day. Does one owe tax on monies not in one's possession, monies that the State claims are ill gotten and do not belong to the Respondent to begin with? Why not just sue for back taxes if this is true? The truth is that the Appellants do not believe the Respondent owes any tax whatsoever. They will not concede he ever truly possessed the funds, much less that he has title to or ownership in them. This is what the trial was about.

The claim that the circuit court should have charged receiving stolen goods is equally ludicrous. No evidence whatsoever was presented that the monies were stolen. The Appellants hoped that the jury would simply pick a crime at random, because Bookert is not the kind of person who the Appellants believe should be in possession of these funds.

When the funds are returned to the Respondent in accord with the jury verdict and circuit court judgment, he will fulfill his legal obligations whatever they may be.

Appellants' arguments should be dismissed and the jury verdict and circuit court judgment affirmed.

ARGUMENT 5

The trial court did not abuse its discretion in failing to grant a new trial due to alleged prejudicial comments made by Respondent in closing argument.

The Appellants' last argument is that the Respondent made a prejudicial argument to the jury. The Appellants contend that the Respondent's suggestion that Appellants were trying to "pull[] one over on th[e] jury," was improper and prejudicial. In the context of this trial, this is truly a silly argument.

(1) Standard of Review:

The standard for analyzing closing arguments before a jury is basically the same in civil and criminal cases.

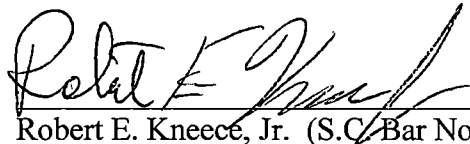
Closing arguments must be confined to evidence in the record and reasonable inferences therefrom. *State v. Huggins*, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). A trial court is allowed broad discretion in dealing with the range and propriety of closing argument to the jury. *State v. Condrey*, 349 S.C. 184, 195-96, 562 S.E.2d 320, 325 (Ct.App.2002). Ordinarily, the trial court's rulings on such matters will not be disturbed. *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997); *see also State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) ("The trial court's discretion will not be overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant."). An appellate court must review the argument in the context of the entire record. *Patterson*, 324 S.C. at 17, 482 S.E.2d at 766.

CONCLUSION

Based on the foregoing arguments, the judgment of the trial court should be affirmed.

Respectfully submitted,

KNEECE, KNEECE, AND BROWN



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Attorney for Appellant

September 23, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2016-000667
Case No. 2013-CP-40-02443

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SEP 26 2016

SC Court of Appeals

Timothy E. Bookert, Jr.,

Respondent,

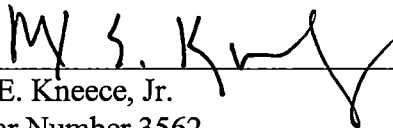
v.

South Carolina Department of
Mental Health, and South Carolina
Treasurer's Office,

Appellants.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent on the South Carolina Department of Mental Health and South Carolina Treasurer's Office by depositing a copy of it in the United States Mail, postage prepaid, on September 23, 2016, address to their attorneys on record, Johanna C. Valenzuela, Esquire, Post Office Box 11549, Columbia, SC 29211 and Jared Q. Libet, Esquire, Post Office Box 11549, Columbia, SC 29211.



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REXFORD P. KNEECE

ROBERT E. KNEECE
(1933 - 2000)

ROBERT SIMS BROWN
(1939 - 2004)

WILLIAM O. KNEECE
(1935 - 2012)

September 23, 2016

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SEP 26 2016

SC Court of Appeals

The Honorable Jenny A. Kitchings
Clerk of Court, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Timothy E. Bookert, Respondent, v. South Carolina Department of Mental Health and South Carolina Treasurer's Office, Appellants
Appellate Case No. 2016-000667
Trial Court Case No. 2013-CP-40-02443

Dear Ms. Kitchings:

Enclosed for filing in your office is the original Initial Brief of Respondent and the Designation of Matter in reference to the above referenced matter along with the Certificate of Service.

Also enclosed you will find a copy of the Initial Brief of Respondent and would ask that it be **time stamped** and returned to our office for our file.

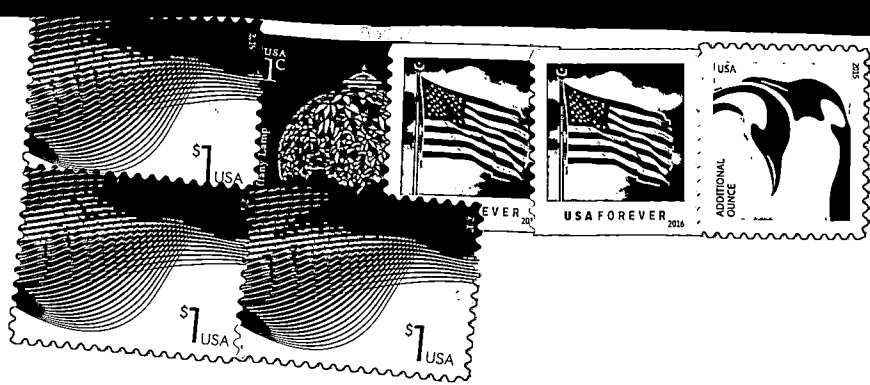
Thanking you, I am,

Sincerely,

KNEECE, KNEECE & BROWN

By:  Robert E. Kneece, Jr.

REKjr:jdd
Enclosures.



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TO: The Honorable Jenny A. Kitchings
Clerk of Court, S. C. Court of Appeals
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SC Court of Appeals



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