THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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

Timothy E. Bookert, Jr.,

Respondent,

v.

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

Appellants.

REPLY BRIEF OF APPELLANTS

October 3, 2016

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I. The Overwhelming Evidence Shows a Bailment Agreement Was Never Formed Between Respondent and Aaron Kennedy

Even when viewing the evidence in a light most favorable to Respondent, the only reasonable inference therefrom is that Aaron Kennedy does not exist and, therefore, there is no bailment agreement from which Respondent can claim a possessory interest in the money found on DMH property. Respondent argues that his statements at trial—despite being contested, disputed, and impeached—still qualify as credible evidence and should therefore be given absolute deference. However, when the evidence submitted is unreasonable on its face, the jury's findings should be overturned. *See Broach v. Carter*, 399 S.C. 434, 440, 732 S.E.2d 185, 188 (Ct. App. 2012) (quoting *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976)) ("[A]" factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which ***reasonably*** supports the jury's findings.") (emphasis added); *see also Hutson v. Cummins Carolinas, Inc.*, 280 S.C. 552, 561, 314 S.E.2d 19, 25 (Ct. App. 1984) (overturning verdict where "conclusions are against the overwhelming weight of the evidence [and] are not supported by any rational view of the evidence"). As argued previously, the only reasonable conclusion to be drawn from the evidence presented, including the Respondent's testimony, is that no bailment agreement was formed between the Respondent and the fictional Aaron Kennedy. Consequently, the jury's verdict must be overturned.

II. The Trial Court Erred in Admitting Prejudicial Hearsay Testimony from Respondent on the Amount of Money

Respondent also urges this Court to hold there was no legal error when the trial court admitted statements on the amount of money involved despite Respondent having ***no personal knowledge*** of the amount of money found on DMH property. Respondent urges the same misreading of the law he presented at the trial court: the amount of the money involved—Respondent claims—is a verbal act. Yet, Respondent does not present even a single case that supports the proposition that the dollar amount involved qualifies as a verbal act necessary to form a contract.

Respondent also argues that, even if the trial court was wrong, the error was harmless because of the stipulation as to the dollar amount found on DMH Property. However, the stipulation was only as to the amount of money in controversy and not a stipulation as to Respondent's knowledge or that the money was ever a part of a contract with the fictional Aaron Kennedy. Throughout the lengthy arguments before the trial court on this exact issue, and after parties had stipulated to the amount, Respondent not once argued that the stipulation addressed or helped resolve the issue of his hearsay testimony. (Tr. p. 8, l. 12 – 9, l. 22; p. 12, l. 2 – p. 23, l. 16; p. 143, l. 2–p. 144, l. 16; p. 147, l. 4– p. 150, l. 9; p. 150, l. 21–p. 151, l. 7.) The limits of the stipulation were very clearly laid out during trial and did not include a stipulation to Respondent's personal knowledge of the money or the amount. (Tr. p. 8, l. 12 – 9, l. 22.)

Further, the trial court's ruling was significantly prejudicial because Respondent's statement on the dollar amount was the **only** piece of evidence connecting him to the funds found on DMH property by another DMH employee. Because Respondent had no personal knowledge

of the amount of money and his testimony was elicited for the purpose of showing his knowledge of the money prior to it being counted by law enforcement, his testimony about the amount of cash was hearsay (Tr. p. 329, l. 20 – p. 330, l. 3). SCRE 801, 805. As hearsay, this testimony should have been excluded by the Court, and its admission was error. The admission of this hearsay evidence prejudiced Appellants and justifies this Court reversing and granting a new trial.

III. The Law Does Not Allow the Court to Enforce a Verdict That Will Result in Respondent's Unlawful Possession of the Funds

Respondent offers no counterargument to the argument that the trial court should have granted a judgment notwithstanding the verdict in favor of Appellants because the only reasonable inference from the evidence is that Respondent's possession of the funds at issue violates statutory law or public policy. For the reasons stated in our Initial Brief, we renew our argument that this Court should not and cannot enforce a contract or a verdict that would further Respondent's attempt to circumvent state and federal tax laws. As such, this Court should reverse the trial court's ruling on the JNOV. (Tr. p. 336, l. 17 – p. 362, l. 2; p. 471, l. 19 – p. 493, l. 15)

IV. The Trial Court Erred in Excluding Appellants' Requested Jury Charges

Respondent argues Appellants were required to prove the illegal activity before the pertinent statutes could be charged to the jury. However, our State Supreme Court set a different standard in *Muhleck v. Tamanini*, 271 S.C. 57, 244 S.E.2d 535 (1978), holding that illegal activity did not have to be proven beyond a reasonable doubt; rather, where "the jury could have concluded respondent violated" the statutory section at issue and where "the statute was

applicable to the facts of [the] case, the trial judge's refusal of appellant's timely request to charge the statute constitute[d] error." *Muhleck*, 271 S.C. at 60, 244 S.E.2d at 537. As in *Muhleck*, there was sufficient evidence in this case to create an inference that Respondent violated state and federal tax statutes through his possession of the funds at issue and had reason to believe the cash was stolen in violation of the state receiving stolen property statute. The proposed charge was current and correct law and in light of the evidence and issues presented at trial, the trial court had a duty to give the requested instruction. Had the trial court charged the statutes as requested, the jury could have concluded Respondent violated those statutes and was thus not able to recover on a claim of conversion. The proposed charge directly addressed Appellants' affirmative defense of illegality and its exclusion was prejudicial to Appellants because there is no doubt the charge would have influenced the jury's verdict. Because the trial court erred by not including the requested statutes in the jury charges, this Court should order a new trial.

V. This Court Should Grant a New Trial Based on Prejudicial Statements Made by Respondent During Closing Arguments.

Alternatively, this Court should grant a new trial based on Respondent's improper closing argument characterizing Appellants as attempting to "pull[] one over on th[e] jury," (Tr. p. 534, l. 4 – 12.). As noted by Respondent, the standard for analyzing closing statements is the same in civil and criminal cases. (Br. of Respondent, p. 26.) Appellate Courts in this state have held numerous times that similar language was inappropriate and required reversal when similar language was used in the past. *See, e.g., S.C. State Highway Dep't. v. Nasim*, 255 S.C. 406, 179 S.E.2d 211 (1971) (ordering a new trial where counsel called the witness on the other side a liar,

a "great highway robber," and stated he "doesn't stand for the same thing that you and I stand for, fair play and justice").

Instructive to this situation, is the language from the Supreme Court of Virginia that was quoted by our Supreme Court:

> "We have frequently had occasion to allude to this bad habit of too many attorneys, who in the excitement of the contest ignore or forget that in a tribunal engaged in the investigation and determination of facts upon which the rights of litigants depend, passion, prejudice, and vituperation have no proper place; **that the privilege and highest duty of counsel should be to aid the court and the jury by accuracy, learning, reason, and persuasion to interpret the evidence so as to ascertain the truth; and that violent denunciations are a hindrance and not an aid thereto, which should not be permitted in a court of justice. The trial courts should firmly and unflinchingly restrain such indulgences. When they fail to do so and verdicts are induced thereby, they will and should be, set aside.**"

Edwards v. Union Buffalo Mills Co., 162 S.C. 17, 159 S.E. 818, 822 (1931) (quoting *Eagle, S. & B. D. Ins. Co. v. Heller*, 149 Va. 82, 140 S. E. 314, 323, 57 A. L. R. 490 (1927)) (emphasis added).

Respondent's statements were inappropriate and capable of leading to a verdict based on emotion rather than logic; therefore, this Court should grant a new trial.

CONCLUSION

For the reasons stated above, this Court should reverse the trial court's decision to deny Appellants' motion for a judgment notwithstanding the verdict and enter a verdict in favor of Appellants, or, in the alternative, reverse the trial court's decision to deny Appellants' motion for a new trial absolute, vacate the verdict, and order a new trial.

Respectfully submitted,

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October 3, 2016

By: Johanna Valenzuela
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PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellants and Designation of Matter on Timothy E. Bookert, Jr., by emailing a copy to both attorneys on record and by depositing a copy of it in the United States Mail, postage prepaid, on October 3, 2016, addressed to his attorneys on record, Miller W. Shealy, Jr., Esq., at 4000 Faber Place Drive, Ste. 450, Charleston, South Carolina, 29423, and Robert Kneece, Esq., at 2520 Devine Street, Columbia, South Carolina, 29205.

October 3, 2016

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October 3, 2016

The Honorable Jenny A. Kitchings
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Re: **Timothy E. Bookert, Jr. v. South Carolina Department of Mental Health and South Carolina Treasurer's Office**
Appellate Case No.: 2016-000667
Lower Court Case No.: 2013-CP-40-02443

Dear Ms. Kitchings:

Attached is the original **Initial Reply Brief of Appellants** in the above referenced case for filing in your office.

Sincerely,

Johanna C. Valenzuela
Senior Assistant Deputy Attorney General
SC Bar #79834

JCV/bea

cc: Robert E. Kneece, Jr., Esquire
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