THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison Renee Lee, Circuit Court Judge

Case No.: 2011-CP-40-1998
Court of Appeals Number: 2016-000772

Jones G. Herring, Respondent,

v.

Gilbert S. Bagnell and Bagnell and Eason, LLC, Appellants.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the Circuit Court in a damages hearing after a default erred in ordering damages without evidence supporting the proximate relation of the damages to the negligence of the Appellants?

STATEMENT OF THE CASE

Respondent ("Herring") commenced a legal malpractice case against Appellants Gilbert S. Bagnell ("Bagnell") and Bagnell and Eason, LLC (Bagnell's law firm) on March 24, 2011. In his complaint, Herring alleged causes of action against Appellants for negligence, fraud, constructive fraud, breach of fiduciary duty and misrepresentation. Herring alleged that he had a meritorious creditor case, which he had engaged Appellants to pursue; that he would have been successful, but for the fact that Appellants did not pursue the case, while continually and falsely representing to Herring that his creditor case was actively being pursued; then refusing and/or failing to provide Herring with his file(s) so that he could otherwise pursue his creditor case, using another attorney, and at the same time allowing the statute of limitations to expire.[1] (See Complaint of March 24, 2011).

Herring sought actual and punitive damages. Appellants were duly served with Herring's complaint. Appellants did not respond to the lawsuit. Accordingly, Appellants were found in default by Order dated June 14, 2011.

Pursuant to the terms of the Order of Default, Herring was to be awarded damages in an amount to be determined at a subsequently scheduled hearing. (See Order of default dated June 14, 2011). A non-jury damages hearing was set for October 31, 2011. Appellants appeared through counsel. Appellants made no motion to set aside the default order.

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[1] Bagnell was permanently disbarred from the practice of law on July 18, 2011. His disbarment arose out of the common nucleus of facts alleged in Herring's complaint against Appellants. Bagnell did not honor a subpoena issued by the Office of Disciplinary Counsel (ODC) for return of Herring's file(s). (See In the Matter of Gilbert S. Bagnell, 393 S.C. 382, 713 S.E.2d 304).

By Order dated November 23, 2011, the lower court found that Herring had proven his case for damages. The lower court awarded actual damages of $254,306.77. Punitive damages of $250,000 were also awarded. The case was appealed. The Court of Appeals remanded the case to the lower court for a new hearing on damages. In the subsequent damages hearing, Herring was awarded $11,147 in actual damages and $100,000 in punitive damages. (*See Order of February 4, 2016*). This appeal has followed.

STANDARD OF REVIEW

Herring agrees with Appellants that the appropriate standard of review is the "abuse of discretion" standard.

"An action in tort for damages is an action at law." Judy v. Judy, 383 S.C. 1, 6, 677 S.E.2d 213, 216 (Ct. App. 2009). In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law. Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C., 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2004).

The trial judge's findings of fact will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or controlled by an erroneous conception of the application of the law. Gordon v. Colonial Ins. Co., 342 S.C. 152, 536 S.E.2d 376 (Ct. App. 2000).

"In a law case, the credibility and weight to be accorded evidence is solely for the fact finder to determine." Hanna v. Palmetto Homes, Inc., 300 S.C. 535, 537, 389 S.E.2d 164, 165 (Ct. App. 1990); see Parsons v. Georgetown Steel, 318 S.C. 63, 67, 456 S.E.2d 366, 368 (1995) (stating the credibility and weight of testimony is for the trier of fact). See also Armstrong v. Weiland, 267 S.C. 12, 16, 225 S.E.2d 851, 853 (1976) ("When the testimony of an expert witness is not relied upon to establish proximate cause, it is sufficient for plaintiff to put forth some evidence which rises above mere speculation or conjecture....").

STATEMENT OF FACTS

In 1998 and 1999, Herring was experiencing significant financial problems. Herring owed substantial consumer debts, far in excess of $10,000.[2] He was a wage earner, with a limited income

[2] By one of Herring's assessments, he owed in excess of $100,000.

and few assets. He was divorced, paying child support and was facing the specter of costs associated with a college education for his son. His debts were growing exponentially and accumulating interest at very high rates. Herring seemingly had no way to repay his debts. He was essentially insolvent. With a bankruptcy, Herring could avoid repaying his consumer debts, be debt free, have his debt history expunged and start his life anew. Admirably, Herring wanted to meet his obligations if there were a viable alternative. (*See Affidavits of Jones Herring of November 17, 2011 and January 17, 2013; see the ROA from the first appeal (2012-212744) pages 22-31 including the damages timeline as well as the supplemental ROA from the first appeal (2012-212744) pages 53-59*).

Herring sought help from United Way Consumer Credit Counseling. With the United Way's assistance, Herring was able to reach an agreement with his creditors to restructure his consumer debt payments. By the terms of his debt restructuring agreement, Herring was provided more time to pay (all) his consumer debts, but at a reduced rate of interest and over a longer period of time. Upon full compliance (repayment of all the debts) by Herring, the creditor(s) agreed that Herring's future credit would not be adversely reported or affected by them.

Relying on his debt restructuring agreement, and without filing for bankruptcy, but through tremendous sacrifice (and getting a second job)[3], Herring was able to honor all his commitments. By late 2005, Herring had paid off all his debt obligations and was in full compliance with his debt consolidation and repayment agreement. However, one of Herring's major creditor(s) did not honor concomitant commitments that were fundamental and material components of Herring's debt restructuring agreement.

After Herring had met all his debt obligations in 2005, his creditor(s) then put derogatory marks against Herring's credit and reported ostensible interest rate reductions to the IRS as "loan forgiveness" income for Herring. The net result was that Herring was damaged by the creditor's wrongdoing. Herring's damages included: the extraordinary efforts he had expended to pay his consumer debts, with a reduced, significantly altered lifestyle associated with repayment, plus

[3] By way of example, living in an apartment so abysmal and cheap that he was embarrassed to let his son visit him there.

interest (that simply could have been avoided with a bankruptcy)[4]; extra taxes; loss of financial eligibility for favorable treatment for certain of his son's college expenses, and/or repayment at a more advantageous rate; loss of eligibility for a lower interest rate associated with his desire to purchase his family's home place that was in probate; ineligibility for consumer credit, except at oppressive interest rates; being placed in a higher income tax bracket; repeatedly receiving the creditor(s)' dunning letters and repeated telephone calls, both at work and at home seeking repayment for the debts already fully paid; and, other avaricious and rapacious behavior by the creditor(s).

Herring had maintained a file(s) containing detailed documentation and logs of his debt restructuring agreement, as well as the wrongful collection practices and errors of his creditor(s), as well as checks, receipts, letters, etc., proving that he had, in fact, met his obligations to repay his consumer debt, that the creditor(s) had violated the agreement and that he was damaged as a proximate result of the creditor wrongdoing. Herring had developed proof that the creditor engaged in egregious, prohibited, predatory conduct. Evidence of same included letters from the local branch of the creditor attesting that Herring was correct, that he had paid his debt in full and that the creditor was in the wrong.[5] In fact, on subsequent analysis, Herring was able to show that he had been overcharged, and hence he had actually overpaid, what was due. Herring attempted to resolve the creditor issues on his own, but was essentially ignored by the creditor(s). He continued to be pressed for payment of consumer debts he did not then owe, as well as continuing to have his ability to borrow at reasonable interest rates impaired and otherwise being damaged.

Herring thereafter sought assistance of the South Carolina Department of Consumer Affairs. Consumer Affairs diligently attempted to assist Herring. It was likewise rebuffed and ignored by the creditor(s). Consumer Affairs provided Herring with a copy of its unsuccessful efforts to resolve the matter.[6] It recommended that Herring engage an attorney and sue. A local

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[4] Had Herring filed for bankruptcy, the consequences of the same would have been completely extinguished well before the time of the filing of the lawsuit.

[5] Prohibited collection activities had been pursued against Herring by the creditor's national chain. By the time of suit, the local branch of the creditor had shut down its business.

[6] Consumer Affairs had a short retention time relative to its activities.

attorney recommended that Herring consult with Appellant Bagnell, and his law firm Bagnell and Eason, who were reported to be experienced in the field of law involved.

In February, 2006, Herring met with Appellant regarding legal representation. There were follow up meetings. Herring's dealings were initially with Bagnell.

In conjunction with their meeting(s), Bagnell insisted that Herring provide him with his complete file(s) establishing liability and damages, including all original documents proving his case of creditor wrongdoing and consequent damages. Herring complied. The file(s) provided to Appellants from Herring were detailed. They were Herring's only copies. The documents contained therein included extensive proof of both creditor wrongdoing and Herring's consequent damages. Bagnell represented that he and his law firm would make copies of Herring's file(s) and return them to Herring after they engaged in terms of a written agreement. The files were not copied and produced to Herring once a formal contract of engagement was entered into.

Bagnell encouraged Herring to sue the creditor. Bagnell stated that the errors by the creditor(s) and Herring's consequent damages were serious, substantial and well documented.[7] Bagnell represented that he and his law firm were extremely well qualified and capable of undertaking the creditor lawsuit on Herring's behalf. Bagnell repeatedly represented that he had obtained a settlement in a similar case for a sum in excess of $120,000,000, and that his fee alone in yet another similar case exceeded $10,000,000. He invited Herring to "Google" it to confirm his qualifications and successes "online", which Herring did.

Bagnell repeatedly represented to Herring that he (Herring) had an excellent case, both as to liability and damages. Bagnell made those representations, presumably based on the documentation Herring had prepared, reviewed with, and entrusted to Appellants.

Bagnell told Herring that, in consideration and in consequence of the circumstances and Herring's thorough documentation of events, he believed Herring's damages were in excess of $100,000, and that the value of his case was independently valued by him (Bagnell) at in excess of $100,000. Bagnell stated that, while he could not guarantee it, Herring was likely to be awarded

[7] The creditor in question had recently settled a deceptive practices class action lawsuit for $590,000,000.00 (See *Citi to Settle Suit for $590 Million*, Wall Street Journal, August 30, 2012).

treble damages and substantial legal fees as well. Bagnell further, but fraudulently, indicated that he was initiating a "class action" lawsuit on behalf of Herring, wherein Bagnell would be the lead attorney. Bagnell advised Herring to be patient; that the process was a slow one but that he would contact Herring as significant events unfolded.

Herring and Appellants had entered into a written contract of employment on May 17, 2006. As a component term of the contract of employment, Appellants fraudulently represented that they had associated a well-known, experienced, and reputable law firm to assist; however, Appellants stressed that all of Herring's contact was to be with Bagnell and his law firm alone.

Many months went by thereafter. Herring did not hear from Appellants. Herring called Appellants and was fraudulently assured that the lawsuit was progressing in a timely and positive fashion. Bagnell sent Herring a copy of a letter he (Bagnell) had purportedly sent to one of Herring's consumer creditors, ostensibly to demonstrate how diligently, vigorously and aggressively Appellants were working on his case. However, as more time went by, Herring did not hear from or receive anything meaningful from Appellants.

As more time elapsed with Herring hearing nothing meaningful from Appellants, Herring again called Appellants' office to inquire about the case and return of his documentation. He left messages. His calls were not returned. He then wrote to Appellants. His letters were not answered. Herring repeatedly requested meetings with Appellants. None of Herring's requests were honored and otherwise were simply ignored and/or Appellants were dismissive. Thereafter, Herring sought the assistance of a separate attorney for the sole purpose of obtaining a case status report from Appellants and/or a meeting. Those efforts evoked no update, no case status report and no response relative to a requested meeting. Further, and despite repeated requests, Appellants would not return to Herring any of his documentation, much less the critical portion of his file that he would need so that he could seek other legal representation and pursue his creditor's case.

When Appellants continued to ignore all of Herring's efforts to meet, to obtain a status report and/or simply to return a copy of his file(s), Herring contacted the law firm whom Appellants had represented they had associated on Herring's behalf. At that time, Herring was informed, not only had that law firm <u>not</u> been engaged or associated by Appellants, but also that it had previously and expressly advised Appellants that it would <u>not</u> agree to be associated with

Appellants, and Bagnell in particular. Appellants had again actively misled and defrauded Herring to his distinct prejudice.

At that point, Herring enlisted the services of an attorney for the purpose of more formally attempting to assist in obtaining a copy of his file(s). Herring's file(s) were critical, in that Herring wanted to pursue his case. By that time, Consumer Affairs document retention time had expired. Herring discovered at this time that a lawsuit had never been filed by Appellants, despite Appellants' repeated assurances that Herring's lawsuit had been filed and that the case was progressing. Herring wrote a series of letters, including certified letters, to Appellants in an attempt to obtain his file so that he could independently pursue his creditor case. Appellants did not respond; they would not provide any of Herring's file to him.

Thereafter, Herring learned that, after Appellants apparently realized their $10,000,000 fee in a separate matter, Bagnell had sold his residence and permanently left the State of South Carolina, never to return. However, both Appellants' telephone answering service and office secretary indicated that Bagnell was simply "out of town", but that he was actively practicing law. Further, Appellants maintained an office in Columbia and received certified mail at that location. Herring's letters and telephone calls to Appellants were once again ignored. Appellants would not provide to Herring his files, much less his documented proof of creditor liability and damages.

Having received no cooperation or response from Appellants, Herring sought the assistance of the South Carolina Bar. Bagnell did not respond to the South Carolina Bar, nor did Appellants produce Herring's file(s) pursuant to its subpoena. (See In the Matter of Gilbert S. Bagnell, 393 S.C. 382, 713 S.E.2d 304). Essentially, Bagnell ignored the South Carolina Bar, and ODC in particular, the same as Appellants had ignored Herring and independent counsel who attempted to assist in obtaining his files as an intermediary.[8] Not only had Appellants engaged in thoroughly unprofessional and deceptive practices, but Appellants had allowed the time to expire in which to sue the consumer creditor(s) who had wronged Herring. Herring was damaged as a result of Appellants' multiple errors, Herring provided testimony and affidavits to the court for consideration regarding a determination of damages. A verdict for actual damages of $11,147.99

[8] Prior to this point in time, Bagnel had been suspended from the practice of law for failure to meet CLE mandates.

and punitive damages of $100,000 was rendered in the second trial. The within appeal focuses on actual damages.

LEGAL ARGUMENT

Appellants assert that they are immune from the consequences of their repeated and multiple bad acts. The essence of Appellants' argument is that:

- An attorney and his law firm are entitled, without consequence, to repeatedly deceive their client and the court(s), as well as to commit gross negligence, fraud, misrepresentation and breach of fiduciary duties;

- An attorney and his law firm are entitled, without consequence, to withhold from their client and the courts(s) valuable documents and other evidence establishing both the serious degree of culpability and extent of damages caused by the attorney and creditor; and

- Without any adverse inference ever being drawn, an attorney and his law firm are entitled to withhold from their client his files necessary for him to engage separate counsel to prove the extent of damages proximately caused by the attorney, his law firm and creditor(s).

Initially, Appellants have erroneously attempted to blend together actual and punitive damages. Actual damages awarded were $11,147.99. Punitive damages were $100,000. Actual damages is the focus of the within appeal.

Appellants' argument as to actual damages, is without merit for two primary, independent but interrelated reasons.

A. Spoliation of Evidence

No litigant should be allowed to engineer or achieve an advantage and/or realize a more favorable result by willfully withholding critical documentary evidence designed to establish and/or support the legitimacy, truth and integrity of what an opposing party asserts. This is especially true where the at-fault parties are/were an attorney and his law firm.

Appellants are to be charged with legal and ethical obligations to their client and the legal system itself. Appellants, and Bagnell in particular, should not be allowed to benefit by ploys to hide the truth and subvert the ends of justice, to Herring's prejudice. Halyburton v. Kershaw, 1810 WL 298 (S.C. Ct. App. 1810); Executors of Blake v. Lowe, 1811 WL 319 (S.C. Ct. App. 1811); Kershaw County Board of Education v. United States Gypsum Co., 396 S.E. 2d 369, 372 (S.C. 1990); Stokes v. Spartanburg Regional Medical Center, 629 S.E.2d 675 (S.C. Ct. App. 2006); Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001).

Herring testified extensively relative to his file(s) being withheld by Appellants, their significance, the consequences and his file(s)' value. His testimony was that he needed his files in order to pursue litigation. He also testified that his files had a value to him far in excess of $10,000, in addition to other proof of damages. The lower court took judicial notice of the terms of Bagnell's disbarment. Appellants had wrongfully and unethically withheld Herring's property/evidence. Considerable, credible and compelling testimony and an affidavit with detailed damages were presented to the lower court proving the file(s)' importance and that Appellants continued to withhold same. Herring presented evidence establishing that his creditor case would have been successful had it ever been filed by Appellants. Herring presented evidence of his damages and the he needed his files to pursue both a creditor case and his case against Appellants. Having deceived Herring, Appellants would now assert that they were entitled to continue to withhold evidence proving Herring's the underlying case, the extent of Appellants' wrongdoing, as well as the extent of damages caused thereby. Appellants' argument is without merit and ignores both the existence of evidence and the inferences to be drawn.

Appellants ignored certified letters from Herring seeking his file(s). Appellants also ignored intermediaries who sought to assist. Appellants, were otherwise dismissive of Herring and the Office of Disciplinary Counsel. Appellants are not to be rewarded by their inattention to detail, their failure to act responsibly or by their additional and serious misconduct.

The record is replete with proof that Appellants withheld important evidence and property from their client, as well as even refusing to turn the file(s) over to ODC. Bagnell refused to honor ODC's subpoena for Herring's file(s). It was unfortunate, but predictable that Appellants would attempt to further toy with Herring and the courts for self-serving purposes so as to attempt to

avoid liability for their own misconduct. After all, Appellants and Bagnell in particular had failed and/or refused to produce Herring's records and file. He chose to be disbarred instead.

Appellants have acted in a duplicitous, disingenuous fashion. Aside from their arguments being internally inconsistent, Appellants' excuses for non-production are not plausible. In consideration of the passage of time and with retention periods having expired, Herring' logs of activities prepared for his planned creditor suit, as well as his other documents establishing damages, were even more valuable, significant and needed by him. They were indeed critical. Given Herring's unsuccessful attempts to acquire his file(s) from Appellants through the channels detailed herein, there was little else Herring could do. Appellants knew this and continued as they had before. Their scheme has been blatant and overt. It has been dishonest and clearly calculated, designed and intended by Appellants to further harm Herring, as well as to hide the extent of their own misconduct in an attempt to escape the consequences of their misdeeds. Such misconduct by an attorney and a law firm should not be approved or condoned by this court.

Herring's file(s) and documentation were valuable to him on a number of levels. Indeed, an adverse inference should be drawn from Appellants' non-production and concealing of Herring's file(s). If Appellants had nothing to hide, and had they not harmed Herring, Appellants would have benefitted by providing his file(s) to Herring and independently to the Office of Disciplinary Counsel. Bagnell opted to be disbarred from the practice of law in this State, rather than simply to return to Herring his file(s), or offer any reasonable or plausible explanation for non-production so that Herring could independently pursue his creditor claims. A law firm with even minimal concern for its client's welfare would have certainly acted reasonably in locating Herring's file(s) and reporting to Herring and/or Office of Disciplinary Counsel the attendant circumstances, especially with Bagnell leaving the State, being suspended from the practice of law and then being disbarred. The fact that Appellants acted as they did speaks volumes about the issues and inferences that were properly drawn by the lower court. Moreover, there was evidence produced at trial establishing the validity of Herring's creditor claims which substantiated the findings of the lower court.

At the risk of being redundant, Herring would assert that Appellants' secreting of Herring's file(s) deprived Herring, *inter alia*, of a reasonable opportunity to pursue his case against the creditors by utilizing professional services of a law firm and attorney more attuned to ethical and

practical, common sense considerations. Without his documentation, Herring could not pursue his case.[9] The evidence before the lower court established that Herring's file(s) would corroborate Herring's averments relative to the underlying claims against creditor(s), as well as to further corroborate the gross wrongdoings of Appellants and further detail the damages they proximately caused. Appellants failed to produce the records for obvious reasons.

Herring's file(s) and Appellants' non-production were relevant to both actual and punitive damages. It was not inappropriate for the lower court to consider all the facts and circumstances in context, and to draw an adverse inference from Appellants' gross misconduct and withholding of evidence.

B. Proof of Damages

In addition to, and independent of the inference to be drawn from Appellants' withholding of Herring's file, Herring provided the lower court with a thoughtful, detailed and compelling description and summary of his damages and losses. (See *Affidavits of Jones Herring of November 17, 2011 and January 17, 2013; see the ROA from the first appeal (2012-212744) pages 22-31 including the damages timeline as well as the supplemental ROA from the first appeal (2012-212744) pages 53-59; see the trial transcript of August 26, 2015 at p. 46, line 17 – p. 47, line 9; p. 81, lines 9-12; p. 100, lines 21-24; p. 108, line 22 – p. 109, line 3; p. 111, line 22 – p. 112, line 3; p.118, lines 20-22; p. 119, lines 23-25; and p. 120, lines 7-13*). The lower court handled the matter in accordance with the principles set forth in Howard v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978) and Limehouse v. Hulsey, (Opinion no. 27279, Filed June 26, 2013). Appellants were given an eminently fair hearing. Evidence supporting the claims of Herring, his damages and the findings of the lower court exist in the record. Proof of damages far exceeding $10,000 was presented.

[9] Appellants claim they provided Herring with his file(s) that would be needed to pursue a creditor claim. Herring adamantly denies that Appellants ever returned his complete file necessary to pursue a creditor claim (much less his file so that he could pursue a case against Appellants). (*See the trial transcript of August 26, 2015 at p. 29, line 23 – p. 30, line 14; p. 41, lines 12 – 25; p. 55, line 21 – p. 56, line 3; p. 56, line 23 – p. 57, line 23; p. 62, lines 4-13; p. 65, lines 20-24; p. 81, lines 17-22; page 95, lines 15-21; and page 96, lines 2-15*).

The lower court gave due weight to the evidence and it would be inapposite to now second guess the lower court. Herring pointedly testified regarding the sacrifices he had made to pay his consumer debt that he could have otherwise avoided by way of bankruptcy. He testified regarding the value of his property (i.e. his file(s))[10] and other substantial damages he had sustained. Appellants were provided with an opportunity to thoroughly cross-examine Herring. Appellants were not prejudiced by the procedure followed. Appellants expressly conceded that Appellants had abandoned Herring. (See the trial transcript of August 26, 2015 at p. 15, line 17). In addition to his testimony, Herring presented to the lower court affidavit evidence (See *Affidavits of Jones Herring of November 17, 2011 and January 17, 2013; see the ROA from the first appeal (2012-212744) pages 22-31 including the damages timeline as well as the supplemental ROA from the first appeal (2012-212744) pages 53-59)* that was credible and reasonably detailed under the circumstances, especially considering Appellants had defaulted, conceded liability and did not personally appear or produce Herring's file(s). Appellants strategically opted not to seek to reopen the case or to further cross-examine Herring relative to the content of his affidavit detailing damages. Their reasons for not doing so remain obvious.

Herring presented the lower court with testimony and an affidavit thoroughly describing damages, a timeline an explanation of events, and an Excel spreadsheet of damages. Herring had confirmed that he had, by his calculation, damages consistent with the award (that had also been submitted to ODC and addressed in Bagnell's disbarment Order). Simply stated, the evidence presented by Herring was considerable, and was properly evaluated by the lower court. It had even more weight to the degree and to the extent it was properly juxtaposed against Appellants' submission(s) and their refusal to provide Herring's file that had been exclusively in their control.

The lower court found Herring's evidence credible, persuasive and compelling. The record reflects that Bagnell told Herring that he had an excellent case, and that his case and his file(s) were each worth at least $100,000. In addition, Appellants appear to concede that Bagnell had told Herring that, while he (Bagnell) could not guarantee it, he (Bagnell) held the opinion that Herring would be entitled to treble damages and fees as well as actual damages. One irony is that, had the lower court trebled those sums, considered the other proof of damages, as well giving

[10] Waites v. South Carolina Windstorm and Hail Underwriting Ass'n, 279 S.C. 362 (An owner may testify as to value of ... personal property).

consideration of the personal sacrifices Herring had made to honor his commitments the damages would have been even greater than the sums awarded.

In essence, the lower court carefully considered all that was properly before it. The award of actual damages was supported in the record. The lower court utilized a conservative approach that was thoughtful, well reasoned, persuasive and seemingly beneficial to Appellants, given the totality of the circumstances. Herring certainly received no special treatment from the lower court; the sums of actual damages awarded were in fact less that the amount Herring sought. There was ample, credible evidence as well as reasonable inferences presented to support the decision rendered. The findings of fact are to be given deference. Daisy Outdoor Advertising Co., Inc. v. Dean Abbott, 317 S.C. 14, 16, 451 S.E.2d. 394, 395 (Ct. App. 1994); Palmettonet, Inc. v. S.C. Tax Comm., 318 S.C. 102, 456 S.E. 2d 385, 387 (1995); Mayes v. Paxton, 313 S.C. 109, 114, 437 S.E.2d 66, 69 (1993). There was no abuse of discretion by the lower court. Midlands Utility, Inc. v. S.C.D.H.E.C., 313 S.C. 210, 437 S.E.2d 120, 121 (Ct. App. 1993). Given the proof and circumstances, the findings of actual damages must be affirmed. No legal or factual error was made by the lower court.

Appellants have confused, ignored and improperly intermingled the standard of proof required to establish damages with proof necessary to establish liability. Appellants' breach of their duties was previously determined by virtue of the Order of Default and otherwise documented. Appellants have not argued or asserted error relative to the Order of Default. Any such claims of error in the Order of default have not been preserved, and thus waived in any event. See Whaley v. CSX Transp., Inc., 362 S.C. 456, 609 S.E.2d 286, citing Holy Loch Distributors, Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court).

CONCLUSION

For the reasons set forth herein, Respondent urges this Court to affirm the decision of the lower court.

RESPECTFULLY SUBMITTED,

Truslow & Truslow Law Firm

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PROOF OF SERVICE

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I certify that I have served **Respondent's Initial Brief** and **Designation of Matter** on Appellant Gilbert Bagnell by depositing a copy of same in the United States Mail, postage prepaid, on October 6, 2016, addressed to his attorney of record, Richard Gleissner, Esquire, Gleissner Law Firm, LLC, 1237 Gadsden Street, Suite 200A, Columbia, SC 29201.

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October 6, 2016

Re: ***Jones Herring (Respondent) v. Gilbert S. Bagnell and Bagnell and Eason, L.L.C. (Appellants)***
Appellate Case Number: 2016-000772

Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Dear Ms. Kitchings:

Please see the enclosed original and one copy of the following for filing in the above referenced case:

1) Initial Brief of Respondent;
2) Respondent's Designation of Matter; and
3) Proof of Service.

Please file same and return the clocked copies in the self-addressed and stamped envelope enclosed. By copy of this letter, I am serving same upon counsel for Appellant.

Sincerely,

Amanda Douglas Hilley
Paralegal for Douglas N. Truslow

cc: Richard R. Gleissner, Esquire
Luke R. Gleissner, Esquire
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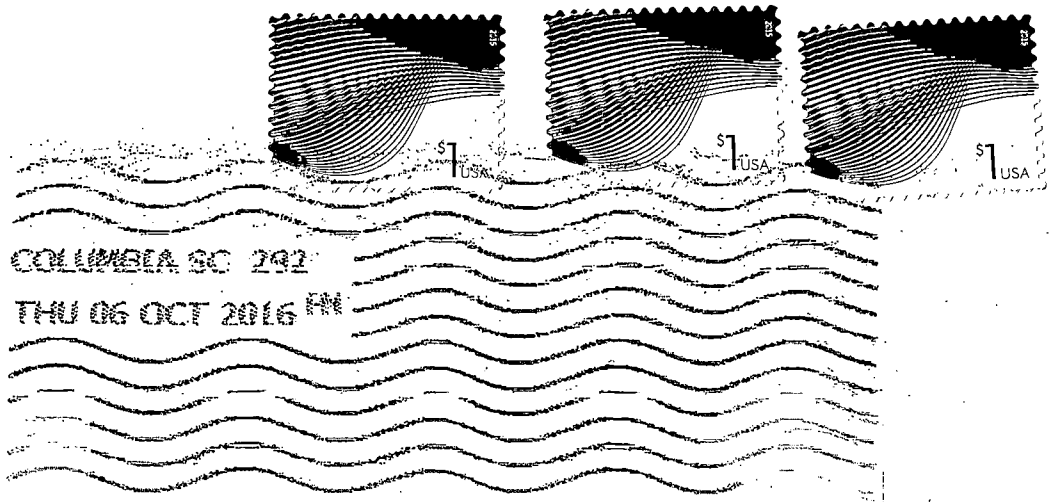

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