STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable J. Mark Hayes, Circuit Court Judge

THE STATE,

APPELLANT,

V.

RICHARD P. KROCHMAL,

RESPONDENT

APPELLATE CASE NO 2015-001914

FINAL BRIEF OF RESPONDENT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the restitution court erred as a matter of law because a criminal is not entitled to monetary compensation for committing criminal acts?

2.

Whether, assuming a criminal is entitled to offset restitution for fair compensation of services rendered, respondent failed to provide any legitimate services and is not entitled to compensation?

COUNTER STATEMENT OF ISSUES ON APPEAL

1.

Whether the restitution court properly awarded the victim $30,100 in restitution since that is the amount expert testimony established was the actual damage to the victim, and the relevant restitution statute, case law, and established principles of contract law provide the victim should be made whole, but is not entitled to a windfall?

2.

Whether the restitution court properly concluded the victim was entitled to $30, 100 in restitution since that was the actual amount of loss or damage to the victims, the victims were not entitled to a windfall because respondent was not licensed at the time the victims used him, it was undisputed the victims benefited from respondent's services, and restitution was meant to make the victim whole, and not to be punitive, or to provide a windfall to the victims?

STATEMENT OF THE CASE

Respondent agrees with the state's procedural history of the case.

ARGUMENTS

1.

The restitution court properly awarded the victim $30,100 in restitution since that is the amount expert testimony established was the actual damage to the victim, and the relevant restitution statute, case law, and established principles of contract law provide the victim should be made whole, but is not entitled to a windfall.

Relevant Facts

At the January 28, 2015 guilty plea held before the Honorable Roger Couch, Judah Vansyckel represented appellant. Brian Petrano was the assistant attorney general representing the state. R. 25. Respondent told the judge that he was guilty because he did not properly supervise other people. "I accept it. I'm guilty. I didn't supervise them. I didn't do what I was supposed to do. I am guilty." However, respondent said he greatly increased the value of the victim's wealth. R. 46, l. 20 – 47, l. 8.

The state agreed to a point: "[T]here was some accumulation of the wealth, but it was not three hundred to a million." R. 48, ll. 18-19.

A restitution hearing was later held before the Honorable J. Mark Hayes, II. Respondent presented the expert testimony of Marcus Hodge. Hodge was a "forensic accountant, fraud examiner, and business evaluation analyst." Hodge had a master's degree in business administration with an emphasis on accounting. R. 58, l. 8 – 59, l. 3. The state had no objection to recognizing Hodge as an expert in forensic accounting and a fraud examiner. R. 59, ll. 8-19. In

Hodge's expert opinion was that respondent overcharged the victims $30, 100. R. 65, ll. 19-23. Hodge explained from his report that respondent should have charged $129,700 during the

indictment period. However, respondent actually charged $159,800. Thus, in Hodge's expert opinion appellant was responsible for $30, 100 in excess fees charged during the indictment as restitution. See, Calculation Report at 2. R. 105.

The defense agreed respondent owed $30, 100.00 in restitution. R. 77, l. 7 – 78, l. 22. The state maintained that respondent owed the victim $159, 809.00 -- the entire amount of fees charged during the indictment period. R. 78, l. 23 – 79, l. 14. It is important to note that the state did not dispute Hodge's mathematics. The state simply took the position that restitution was every dollar respondent ever received from the victim's which was $159, 800.00 R. 78, l. 23- 79, l. 4.

In the judge's order of restitution filed August 27, 2015 he determined the proper amount of restitution be $30, 100.00. The judge ordered that the restitution payments be made to the victims in Oregon. R. 8.

Respondent, at the trial level, and now on appeal strongly maintains that under the restitution statute, the relevant case law, and established principles of contract law that $30,100 is the proper amount of restitution.

A . S.C. CODE § 17-25-322

S.C. Code § 17-25-322 provides for a hearing "[w]hen a defendant is convicted of a crime which has resulted in pecuniary damages or loss to a victim." The state must prove a pecuniary damage or loss to the victim, and that the defendant's actions were the proximate cause of that damage or loss.

Restitution is intended to reimburse victims for their loss. It is intended to "make a victim whole again." In order to qualify as restitution, an amount must therefore qualify as "pecuniary damages or loss."

The state agrees that § 17-25-322 is a proper mechanism for determining restitution, but its argument disregards the plain language of the statute. Again, the statute speaks of "pecuniary damages or loss."

The state continues to argue that the victims should be entitled to restitution in the form of all the fees. However, this would simply result in a windfall for the victims. Even if the victims had hired a licensed investor, they would have had to pay him similar fees. The only measurable loss in the case is $30,100, the amount of fees that the victims were improperly overcharged by the respondent. Restitution under § 17-25-322 is not intended to be punitive, but to be restorative, to make one who has suffered a loss whole. Further, as stated above, the state admitted at the guilty plea that respondent aided the victims – it just disagreed with how much.

B. CONTRACT LAW PRINCIPLES

Contract law can also be instructive in the area of a mistake or misrepresentation of fact in a contract. Where a misrepresentation as to the quality of goods is discovered after delivery, the buyer has two possible remedies: (1) to avoid the contract, return the goods, and receive the purchase price in return; or (2) to retain the goods and receive an abatement in the price if they are worth less. See,e.g., Southern Iron & Equipment Co. v. Bamberg, Ehrhardt, & Walterboro Ry. Co., 151 S.C.506, 149 S.E. 271 (1929).

To ask for restitution in the amount requested by the state in the lower court would essentially be requesting to avoid the contract as a whole. Again, however, it is undisputed that the victims have already received the benefit from the contract - profit off their investments during the time period in question. The victims obviously have not returned their financial gain, the benefit they received under the contract. Consequently, for this reason and others, the judge correctly ruled that the victims would receive restitution under the second theory. They retain the benefit of

respondent's work, and they will receive an abatement in price as their remedy – the overcharged amount, $30,100.00.

C. RELEVANT CASE LAW

In South Carolina a license is required to do many things: to practice medicine, to practice law, to be a barber, or to build houses. This Court decided a case involving facts that are ultimately very similar to those at issue here, making its analysis helpful in showing why the decision of the lower court should be affirmed.

In Lenz v. Walsh, 362 S.C. 603, 608 S.E.2d 471 (Ct. App. 2004), an unlicensed homebuilder sued to enforce the final payment on a home he built for the appellants. The appellant homeowners counterclaimed for damages in the amount they had to spend to complete the home. This Court held that although the plaintiff could not sue to enforce the contract pursuant to state statute, the appellants also could not recover the amount they spent to finish the home because it was not in excess of what they would have paid to the plaintiff under the contract. In doing so, this court stated: "Allowing the Walshes to recover these sums would be indistinguishable from allowing them to recover money paid directly to the builder to purchase construction materials." *Id.* at 609, 474.

In Lenz, state law specifically prohibited the unlicensed homebuilder from enforcing the contract. *Id.* at 607, 473. State law also criminally prohibited this offense. This goes even further than the law that applies to the case at bar, which makes transacting business as an unlicensed investment advisor illegal, but makes no mention of enforcement of contracts. Even with such a prohibition, this Court in Lenz held that the homeowners could not recover amounts paid to finish the home unless they were in excess of the contract amount. In short, this Court determined that the

Appellant homeowners had not suffered any damage or loss under the contract, even though the plaintiff's actions constituted a criminal offense.

This Court adopted the holding from a North Carolina Court of Appeals Case, *Hawkins v. Holland*, 97 N.C. App. 291, 388 S.E.2d 221 (Ct.App. 1 990). The court held that homeowners could not recover payments that they had already made to an unlicensed builder under a residential building contract. The Court found the Hawkins court's reasoning to be persuasive, specifically the principle that "equity and the principles of restitution *do not require that unlicensed contractors be completely uncompensated or that contracting homeowners receive the completed construction without cost*." *Lenz* at 608, 473. (emphasis added).

The lower court essentially followed the reasoning of the *Lenz* decision in this case. Even though respondent was not licensed at the time of the transactions and his actions thus constituted a criminal offense -- for which he was prosecuted and to which he ultimately pled guilty -- the only monetary loss suffered by the victims consisted of the amount of money that they were charged in excess of the fee agreement. Principles of equity and restitution do not require that an unlicensed investor be completely uncompensated or that the contracting clients receive the benefit of the investment contract without cost. The lower correct properly reasoned that the victims were charged $159,800, and that they should have been charged $129,700. The difference between the two amounts comes was the $30,100, the amount of restitution ordered by the lower court. The ruling of the lower court should be affirmed.

2.

The restitution court properly concluded the victim was entitled to $30, 100 in restitution since that was the actual amount of loss or damage to the victims, the victims were not entitled to a windfall because respondent was not licensed at the time the victims used him, it was undisputed the victims benefited from respondent's services, and restitution was meant to make the victim whole, and not to be punitive, or to provide a windfall to the victims.

Argument two in the brief of appellant is in reality a continuation of argument one. Appellant incorrectly argues that: "Respondent failed to provide any legitimate services and it not entitled to compensation [offset]." Brief of Appellant at 10. The statement that respondent did not provide a service to the victims contradicted its acknowledgement in the lower court. "[T]here was some accumulation of the wealth, but it was not three hundred to a million." R. 48, ll. 18-19.

Respondent presented expert testimony and the calculation report showing the proper amount of restitution to the victim was $30, 100. R. 104. Appellant's argument that respondent should pay the victim $159,100, rather than the actual loss suffered by the victims, would result in an unjustifiable windfall for the victims. That was not the purpose of restitution pursuant to the restitution statute. As argued supra, the restitution statue envisions the offender making the victim whole. The statue was not designed to make the defendant pay the victim an unjustifiable windfall that has no relation to his actual damages.

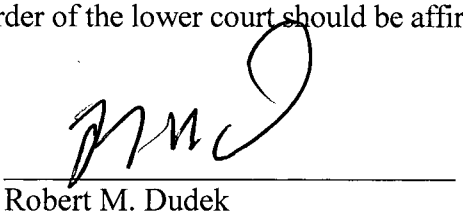
In contract law, under Principles of Quantum Meruit, based on quasi-contract, respondent in this case conferred a benefit upon the victims. The victims realized that benefit, and even the state, as seen above, admitted respondent conferred a benefit on the victims that was realized by the victims. The victims retained that benefit under conditions that would make it unjust for them to retain the entire benefit without some offset of its value. See, Earthscapes Unlimited, Inc. v.

Ulbrich, 390 S.C. 609, 703 S.E.2d. 221 (2010). The same result would apply from our case law which does not allow a windfall to the plaintiff or the victim because the defendant engaged in conduct that was criminal. See, Lenz v. Walsh, 362 S.C. 603, 608 S.E.2d 471 (Ct. App. 2004).

The trial judge held a hearing and considered legal memorandums on this issue. The order shows that the trial judge was very thoughtful and came to the right result in ordering respondent to pay the victims $30,100 in restitution. Again, that result was supported by expert testimony and documentation. For these reason, the restitution order of the trial judge should be affirmed.

CONCLUSION

By reason of the foregoing arguments, the order of the lower court should be affirmed.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

This 22nd day of December, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 22, 2016

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