STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No.: 2015-002648

ABC Amusements, Inc., and Scott Wiener ..... Respondents,

vs.

Michael O. Howard, High-Lite Rides, Inc., and MGR Rides, LLC ..... Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This case involves a dispute regarding a Contract dated April 1, 2010 for the purchase of certain amusement ride equipment. On August 21, 2013, Respondents filed a Complaint against Appellants, Michael O. Howard ("Howard"), High-Lite Rides, Inc. ("High-Lite"), and MGR Rides, LLC ("MGR") alleging Breach of Contract; Breach of Contract Accompanied by a Fraudulent Act; and, Conversion (R. pp. 3-7). On October 23, 2013, Appellants filed an Answer and Counterclaim. The first Counterclaim by Howard alleged a Breach of Contract/Debt Collection. On December 16, 2013, Appellants filed an Amended Answer to add a second Counterclaim. The second Counterclaim alleged a Breach of Contract by High-Lite as a third-party beneficiary of the Contract. On September 29, 2014, Appellants filed a Second Amended Answer and Counterclaim to add a third Counterclaim. The third Counterclaim alleged an action for "claim and delivery" which sought the return of the amusement ride equipment.

On August 6, 2014, Appellants filed a Motion for Summary Judgment concerning all causes of action submitted by both parties including Respondents' claims that Appellants breached a Covenant not to Compete. On October 10, 2014, Appellants' Motion for Summary Judgment was denied. On December 10, 2014, Appellants filed a second Motion for Summary Judgment as to Howard's cause of action for "claim and delivery." On January 26, 2015, this motion for Summary Judgment was also denied. On March 10, 2015, Respondents filed a Motion for Summary Judgment as to Appellants' counterclaims. On May 29, 2015, Respondents' motion for Summary Judgment was denied. On October 13, 2015, Appellants filed a Third Amended Answer and Counterclaim to insert the defense of the Statute of Frauds as to the alleged Covenant not to Compete (R. pp. 32-41).

This case was tried by jury during the week of November 9, 2015. Prior to swearing the jury, Appellants renewed their motion for Summary Judgment as to Respondents' claim that Appellant violated a Covenant not to Compete upon the basis that the Covenant not to Compete did not exist, and even if it did exist, the terms of the Covenant did not comport with the requirements of South Carolina law, and was therefore, void as a matter of law and public policy. (R. pp. 118-122). Appellants' arguments as to this issue, among others, were set forth fully in their pre-trial brief filed November 9, 2015, a copy of which the trial judge reviewed at the time of Appellants' motions (R. pp. 118, lns. 20-21). The pre-trial brief set forth several facts that were not in dispute, including Respondents' own admissions that a Non-Compete Agreement was never signed and that a separate writing containing a Non-compete Agreement did not exist (R. pp. 43-68). Respondents' counsel admitted a separate writing containing a non-compete agreement did not exist (R. p. 122, lns. 19-22).

The trial judge found there was no separate writing that contained a separate covenant not to compete. Nevertheless, the trial judge took Appellants' motion under advisement and the case proceeded to trial (R. p. 125, ln. 12 - p. 126, ln.5). Testimony concerning a covenant not to compete was allowed over Appellants' objection. After Respondents' case in chief, Appellants made motions for directed verdict as to the alleged breach of a Covenant not to Compete; Respondents' cause of action for conversion; Howard's cause of action for breach of contract/debt collection; and High-Lite's cause of action for breach of contract (R. pp. 198-206). Consistent with his deposition testimony referenced in Appellants' pre-trial brief, Respondent admitted in cross-examination that he never delivered a separate non-compete agreement; there was no defined geographical limitation; and, that he never paid separate consideration for the non-compete agreement (R. p. 191, ln 20 – p. 196, ln. 18). Again, the trial judge took under advisement Appellants' directed verdict motion to dismiss the breach of a Covenant not to

Compete. Respondents consented to Appellants' directed verdict motion as to their claim for conversion. The trial judge denied Appellants' remaining motions for directed verdict. Therefore, no curative instruction was given to the jury to disregard testimony and evidence pertaining to the alleged covenant not to compete.

At the conclusion of all of the evidence, Appellants renewed the same motions for directed verdict. Additionally, Respondents consented to Appellants' motion for directed verdict as to Respondents' cause of action for breach of contract accompanied by a fraudulent act (R. pp. 233-234). The trial judge ruled in favor of Appellants' motion for directed verdict as to a breach of a covenant not to compete (R. p. 235, ln. 7 – p. 236, ln. 20). However, the trial judge denied Appellants' request for the trial judge to instruct the jury as a matter of law that they could not consider whether Appellants breached an alleged non-compete agreement, and to disregard any testimony and evidence pertaining thereto (R. p. 242, ln. 15 – p. 243, ln. 24).

The jury awarded Appellants ownership of the equipment; awarded Respondents damages in the amount of $690,589.00; and, awarded Appellants damages in the amount of $3,360.00 for breach of contract for failure to pay Appellants for equipment repairs. The Court reduced Respondents' award by the amount of the verdict in favor of Appellants, and on November 16, 2015, the Court entered judgment against the Appellants in the amount of $687,229.00 (R. p. 99).

On November 17, 2015, Respondents filed their post-trial motions (R. pp. 102-103). On November 23, 2015, Appellants filed their post-trial motions (R. pp. 104-108). On December 8, 2015, the Court summarily denied all post-trial motions (R. p. 110). On December 29, 2015, Appellants filed their Notice of Appeal. On January 5, 2016, Appellants ordered the Trial

Transcript. On August 30, 2016, Appellants received the Transcript. On November 30, 2016, Appellants filed their Initial Brief. On March 1, 2017, Respondents filed their Initial Brief. On March 28, 2017, Appellants filed their Reply Brief. On April 25, 2017, Appellants served the Record on Appeal on Respondents.

FACTS

Respondent ABC Amusements, Inc. ("ABC") is a company in the business of doing festivals, shows, and carnivals. Respondent Scott Wiener ("Wiener") is the majority owner of ABC. High-Lite is a company in the business of manufacturing and repairing amusement rides. MGR is a company in the business of leasing amusement rides. Howard is the sole owner and operator of both High-Lite and MGR.

Howard was in the business of leasing and playing events with amusement rides for many years. In early January, 2010, in an effort to "slow down," Howard decided to sell his amusement rides. Howard began negotiations with Palmetto Amusements for the purchase of his amusement rides. However, soon thereafter, Wiener became interested in buying the rides. Wiener was an existing customer of Howard. Howard leased and sold rides to Wiener for several years prior to 2010 (R. pp. 127-128; 210-213). Some weeks or months prior to April 1, 2010, Wiener delivered to Howard a document entitled "Proposal for Buyout of Rides" (R. p. 262) (R. p. 171, lns. 13-21). The Proposal itemized the purchase price of the rides as well as the purchase price of the "MGR Route." The Proposal was drafted weeks or months prior to the execution of the Contract, was not signed, and was not incorporated into the Contract (R. p. 171, lns. 13-21). Nevertheless, in an effort to "bootstrap" a non-compete agreement into the Contract, Respondents' position at trial was that the proposal was part of the Contract.

Wiener visited Howard's shop and picked out the equipment he wanted to buy. On April 1, 2010, Howard, in his individual capacity, and Respondents, entered into a Contract (hereinafter "Contract") (R. p. 418-431), in which Respondents agreed to purchase from Howard amusement ride equipment for a contract price of $633,000.00. The Contract included the following provisions:

1. Section 1.2 and Section 6.2 provided that the equipment was sold "as is", "where is" and "how is".
2. Section 1.3 provided that Howard agreed to transfer title of the equipment after the equipment was paid for in full, including any outstanding maintenance and late penalties.
3. Section 2.1 provided a purchase price of $633,000.00 for the equipment.
4. Section 2.2 provided the following terms of payment according to an amortization scheduled attached thereto: From May 1, 2010 – October 1, 2010 and from May 1, 2011 – October 1, 2011, Respondents were obligated to pay the amount of $8,333.33 to Howard. From May – October for the years 2012 – 2018, Respondents were obligated to pay Howard the amount of $13,738.20 until the debt was paid in full.
5. Paragraph 2.3 provided that any unpaid portion of the purchase price is subject to an interest rate of two (2%) percent per year calculated on a monthly rate of 0.1667.
6. Section 3.1 of the Agreement provided that "Purchaser and Seller shall execute a non-compete agreement to prohibit seller form competing with business of purchaser under the terms and conditions specified in that agreement."
7. Section 4.2(c) required Purchaser to deliver a Non-Competition Agreement to Seller.

8. Section 8.2 of the Agreement required Respondents to use High-Lite as the single source for all maintenance and mechanical support of the amusement rides.
9. Section 8.5 required Howard to refer all inquiries about amusement rides (not equipment) to Respondents "during the 10 year non-compete period."
10. Section 9.1 required Howard to notify Respondents of their failure to make payment as required by the Contract by U.S. Mail.
11. Section 9.2 provided Howard the right to recover the Equipment if Respondents defaulted on their payments.
12. Section 12.1 of the Agreement requires any amendments to the Agreement to be in writing.
13. Section 12.6 provided a merger clause as follows: "This Agreement and the documents referred (listing of these documents to be in schedule 13.6)[1] to herein contain the entire understanding among the parties with respect to transactions contemplated hereby and supersede all other agreements, understandings, and undertakings among the parties with respect to the subject matter thereof."

The Contract did not contain any provisions regarding the MGR Route.

From April 1, 2010 – July 1, 2013, Respondents paid Howard for the equipment and paid High-Lite for maintenance of the equipment. Howard referred business to Respondents and attended events with Respondent for "almost a full two years" after April 1, 2010 even though Wiener did not attend most of the events. Howard was willing to assist Wiener with the events for two (2) years because he wanted Wiener to succeed. (R. p. 214, ln. 6 – p. 215, ln. 14). Howard even carried Respondents on his insurance for the first year of the Contract because

[1] The Contract does not contain a Schedule 13.6.

Respondents could not obtain their own policy (R. p. 226, lns. 5 – 23). However, in 2012, "everything went south." (R. p. 214, ln. 11).

In 2011, Howard began receiving complaints about Respondents' performance at events (R. p. 215, ln. 11). Wiener began to alienate Howard's biggest customers because of his poor performance such as Professional Affairs' events in Evansville, Indiana and Albany, Georgia; a Will & Kris Amusements event at Spartanburg Spring Fling; an event in Virginia with Magic Shows; event with the City of Gaffney; Abrams Catering event at North Carolina State University; event at First Baptist North Spartanburg; and, an event with Canton Lions Club in Canton, NC. (R. p. 495, ln. 25 – p. 505, ln. 9).

Several event operators testified at trial regarding Respondents' poor performance and lack of credibility.

Max Pfeiffer, the owner and operator of Professional Affairs, an event planning company, plays 75-100 events per year. He testified he would no longer use Respondents based upon certain incidents involving Respondents in Evansville, Indiana and Albany, GA. (R. p. 468, ln. 22 – p. 473, ln. 10; R. p. 417).

Will Kirksey, owner of Will & Kris Amusements, Inc., testified he would no longer use Respondents for their events after Wiener met with the event committees at Spartanburg Spring Fling and Freedom Weekend Aloft in an effort to take these event from Will & Kris Amusements (R. p. 208, ln. 18 – p. 209, ln. 21; R. p. 415). In fact, Respondent admitted he tried "to steal" the Spartanburg Spring Fling event (R. p. 173, ln. 15 – p. 175, ln. 4).

Ed Brown, owner and operator of the Big Ed Brown rodeo for forty-seven (47) years, testified that he called Howard and told him not to send Respondents to his event after their performance at his rodeo in 2011 and 2012. (R. p. 475, ln. 5 – p. 479, ln. 16; R. p. 416).

Michael Reisinger, owner of Michael's Enterprises, Inc., plays 50-60 events a year. In 2008, Mr. Reisinger sent two rides for Respondents to use at an event at Redemption World Outreach Church. Wiener wrote Reisinger a check for $6,500.00 for the work. Reisinger lost the check, but then found it a few years later. In 2013, Mr. Reisinger called Wiener about the check and Wiener told him to deposit it. The check did not clear, and after informing Wiener the check did not clear, Wiener never paid Mr. Reisinger for his services. As a result, Mr. Reisinger decided he would no longer do business with Respondents (R. pp. 458-464).

Because Howard's customers would no longer use Respondents to assist with their events, Howard stopped referring customers to Respondents. Yet, Respondents claimed damages from events with the very same customers that would not use Respondents for their events.

After July 1, 2013, Respondents stopped paying Howard and High-Lite the payments according to Section 2.2 and 8.2 of the Contract (R. p. 162, lns. 3-10). From July 1, 2013 through the date of trial, ABC continued to use Howard's equipment at events while making money with the equipment and not paying Howard according to the Contract (R. p. 168, lns. 2-8). In fact, according to Defendant's Exhibit No. 2 and his own admission, Respondent played, at a minimum, seventy-one (71) shows from July 1, 2013 through the date of trial with Howard's equipment while not paying Howard. (R. p. 169, ln. 20- p. 170, ln. 1).

Respondents submitted Plaintiff's Exhibits three (3) and four (4) as proof of its damages. The information contained therein was compiled by Respondents from MGR's bank records (R. p. 115, ln. 6 – p. 117, ln. 9). Exhibit three (3) listed events Respondents alleged Appellants played after April 1, 2010 and listed a total of the amount received for that event. After

subtracting payments MGR paid to Respondents, Respondents' alleged damages, according to Exhibit 3, was $370,445.26 (R. p. 263-266).

Exhibit four (4) was a list of events Respondents alleged were "cash events" that Appellant participated in and received payment without any entry on Appellants' bank records or ledgers. According to Exhibit 4, Respondents alleged damages of an additional $123,000.00 (R. p. 290).

Through extensive cross-examination, Appellants demonstrated the unreliability and misleading nature of Exhibits 3 and 4.

Exhibit No. 3

In regards to Event No. 2 dated May 17, 2010 at Life Song Church, Respondent could not recall if Appellant actually paid him for that event or not (R. p. 180, ln. 9 – 22). In regards to Event No. 4, as well as many of the events through 2012, Howard and Respondents were playing the events in concert and sharing the revenue. Yet, Respondents still claimed damages through Exhibit No. 3 for the entire amount received. (R. p. 181, ln. 23 – p. 182, ln. 10). In regards to Event No. 7, Respondent admitted that the amount of $15,150.00 was inaccurate (R. p. 183, lns. 8 – 11). In regards to Event No. 17, Respondent again admitted the alleged damage of $7,750.00 was speculative because he could not remember whether or not he received payment from Appellants for that event (R. p. 184, ln. 6 – p. 185, ln. 19). Additionally, many of the events (Nos. 25, 26, 27, 29, 30, 31, 32, 35, 36, 37, 38, 39, 42, 45, 46, 48, 49; and 52-55) were events for customers who would not use Respondents (R. p. 186, lns. 9-13; lns. 23-25).

Exhibit No. 4

Respondent testified he prepared Exhibit No. 4 without any personal knowledge or way to verify that Appellant actually played those events or made any money from those events. Rather, the information was based upon his recollection of events he previously played that were

"cash events," and the revenue those events typically generated. Respondent admitted that the amount of revenue generated each year could change. (R. p. 187, ln. 9 – p. 188, ln. 18). Respondent even admitted counting one entry in Exhibits 4 that he already included in Exhibit 3 (R. p. 189, lns. 2 – 23).

During cross-examination, Respondent also conceded that his alleged damages listed in Exhibits 3 and 4 did not account for the expenses involved in playing events (R. p. 189). Respondent admitted the gross revenue does not equal the net profit (R. p. 176, lns. 6-9). Respondent acknowledged there would be expenses for gasoline, repairs, inspection fees, transportation costs, and insurance. Respondent admitted that the expenses would be substantial (R. p. 176, ln. 10 – p. 177, ln. 25). Yet, Respondent's alleged damages in Exhibits 3 and 4 did not account for any expenses. Respondent admitted some expenses would have to be deducted (R. p. 178, lns. 22-25) and he admitted that the numbers in Exhibits 3 and 4 did not fairly and accurately represent his alleged damages (R. p. 179, lns. 1-21).

On the other hand, Appellants' evidence and request for damages was certain and accurate. Appellants produced copies of Titles; Manufacturer Certificate of Origin (MSOs); Bills of Sale; and photographs of serial plates to prove that Howard owned all of the equipment (R. p. 217, ln. 3 – p. 225, ln. 1; R. p. 432-452).

Appellants produced unpaid invoices due High-Lite Rides for repairs (R. p. 412). Respondents admitted they owed the amount of $3,360.00 for repairs.

Appellant also produced evidence of its damages according to the clear and unambiguous terms of Section 2.2 of the Contract. Steve Milner, CPA, testified that the amount of past due payments owed to Howard under the terms of the payment schedule through November 9, 2015

was $213,314.34 (R. p. 227, ln. 13 – p. 229, ln. 7; R. p. 453-454). He further testified that the total amount Respondents owed Howard under the Contract at the time Respondents stopped payment was $458,108.12 (R. p. 230, lns. 3-4; R. p. 455-456).

STANDARD OF REVIEW

In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by 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. *Townes Assoc., Ltd. v. City of Greenville,* 266 S.C. 81, 221 S.E.2d 773 (1976).

ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO GRANT APPELLANTS' PRE-TRIAL MOTION FOR SUMMARY JUDGMENT AS TO A BREACH OF A COVENANT NOT TO COMPETE.

Respondents' case for breach of contract rested upon allegations of a breach of a covenant not to compete. (R. pp. 3-5). There is no question that the Contract alluded to a covenant not to compete. However, the existence of a non-compete agreement was never a fact in controversy because both parties testified that they never signed one. Furthermore, a review of the four-corners of the Contract did not contain sufficient or adequate terms to satisfy South Carolina law regarding a covenant not to compete. The trial judge erred by failing to grant Appellants' pretrial motion for summary judgment. The failure to do so allowed the jury to consider evidence of a covenant not to compete that did not exist, and even if it did exist, violated South Carolina law.

When reviewing the denial of a motion for directed verdict, the court must consider the evidence in the light most favorable to the non-moving party. *Brady Dev. Co. v. Town of Hilton Head Island,* 312 S.C. 73, 439 S.E.2d 266 (1993). A directed verdict should not be granted unless only one reasonable inference can be drawn from the evidence. *Id.* If the evidence as a whole is susceptible of more than one reasonable inference, the case should be submitted to the jury. *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 112, 512 S.E.2d 510, 518 (Ct. App. 1998).

Section 3.1 of the Contract provided as follows: "Purchaser and Seller *shall execute* a non-competition agreement to prohibit Seller from competing with the business of Purchaser under the terms and conditions specified in *that* agreement." (italics and underline added) (R. p. 18). Paragraph 4.2(c) provided that the Purchaser, the Respondents herein, *shall deliver* a "Non-competition Agreement between Purchaser and Seller." (italics and underline added). (R. p. 18-19).

Respondent admitted in his deposition (R. p. 45, pgh 9-10) and his counsel admitted during the pre-trial motion that there was never a separate covenant not to compete (R. p. 122, lns. 19-22; R. p. 195, lns. 6-24). Respondent further admitted that the four concerns of the contract contained no geographical limitation and the only duration of time mentioned was ten (10) years (R. p. 192, ln. 1 – p. 193, ln. 10; p. 194, lns. 20-24).

Additionally, the Contract and the parol evidence rule barred the Respondents from introducing terms that were not in the Contract. Section 12.6 of the Contract provided a typical merger clause as follows: "This Agreement and the documents referred (listing of these documents to be in schedule 13.6)[2] to herein contain the entire understanding among the parties

[2] The Agreement does not contain a Schedule 13.6.

with respect to transactions contemplated hereby and supersede all other agreements, understandings, and undertakings among the parties with respect to the subject matter thereof." (R. p. 63). Section 12.1 required all amendments must be in writing and signed. Respondent admitted that the Sections 12.1 and 12.6 required all Agreements to be in writing and signed. (R. p. 196, ln. 1 – 12; R. p. 172, lns. 3-7).

Likewise, the parol evidence rule prevented the Respondents from introducing extrinsic evidence of agreement or understandings contemporaneous with or prior to execution of the Contract. *See Iseman v. Hobbs*, 290 S.C. 482, 351 S.E.2d 351 (Ct. App. 1981).

Based on the foregoing, there was no contract before the trial judge that he could have reviewed to determine, as a matter of law, whether the covenant satisfied the legal requirement for a non-compete agreement. The Court and the parties were bound by the terms set forth in the four (4) corners of the Contract.

Legal Standards for a Covenant not to Compete

Covenants not to compete are looked upon with disfavor, examined critically, and strictly construed. *Moser v. Gosnell*, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999). In the context of a Covenant Not to Compete examined pursuant to the sale of a business, South Carolina courts hold that those agreements must meet the following requirements to be enforceable: 1) necessary for the protection of the legitimate interest of the purchasing party; 2) reasonably limited to time and territory; 3) reasonable from the standpoint of sound public policy; and, 4) supported by valuable consideration. *Somerset v. Reyner*, 233 S.C. 324, 329, 104 S.E.2d 344, 346 (1958); *SC Finance Corp. of Anderson v. West Side Finance Co.*, 236 S.C. 109, 119, 113 S.E.2d 329, 334 (1960).

A covenant not to compete is a contract that must be reviewed in the same manner as any other contract. South Carolina law is clear that in construing the terms of a contract, the foremost rule is that the court must give effect to the intentions of the party by looking to the language of the contract. The Court must construe the contract to its plain, ordinary, and popular meaning. *Moser*, 334 S.C. at 426, 513 S.E.2d at 430.

In this case, there were no terms for the Court to review. The Contract set forth and the parties understood the Contract to mean that they would sign a separate written agreement containing the covenant not to compete. Since there is no such written agreement, the trial judge could not possibly determine if the terms of the covenant were invalid or that Appellants violated the alleged covenant not to compete. The Court could not determine if the covenant not to compete satisfied the mandatory requirements set forth by South Carolina law, i.e., reasonableness as to time and territory; supported by valuable consideration; reasonableness from the standpoint of public policy; and legitimately necessary for the Respondents' protection.

Even if the Contract did not require the parties to enter a separate agreement containing the non-compete, and furthermore, that the parties intended to rely upon the language of the Contract as a basis for the covenant not to compete, the covenant was invalid as a matter of law. First, the Contract does not provide any territorial restrictions. Second, the Contract did not provide for separate consideration. Third, the only time limitation mentioned in the Contract was ten (10) years. Ten (10) years is unreasonable and void as a matter of law because it violates public policy. Our Courts have held that two (2) and three (3) year terms are reasonable, but have never upheld a ten (10) year term. *See Rental Uniform Service, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983); *Stringer v. Herron*, 309 S.C. 529, 424 S.E.2d 547 (Ct. App. 1992).

Statute of Frauds

The Statute of Frauds (S.C. Code Ann. § 32-3-10(5)) required the Contract to be in writing and signed because it could not be performed within one (1) year. The Statute of Frauds was yet another reason the Court erred by denying Appellants' motion for directed verdict.

"Blue Pencil" Rule

Finally, because our Court does not follow the "blue pencil" rule, there was no basis for the trial judge to hear evidence regarding the parties verbal understanding of the terms of the covenant not to compete. South Carolina law does not permit the court to re-write, add to, or "blue pencil" the restrictions in a Covenant not to Compete. South Carolina law provides that the restrictions cannot be rewritten by a Court or limited by the parties' Agreement, but must stand or fall on their own terms. *See Poynter Investments, Inc. v. Century Builders of Piedmont*, 387 S.C. 583, 694 S.E.2d 15 (2010); *Stonhard Inc. v. Carolina Flooring Spec., Inc.*, 366 S.C. 156, 621 S.E.2d 352 (2005).

In *Stonhard*, the Court held that a Non-compete Agreement, which did not contain a geographical limitation, could not be reformed or "blue penciled." The Court reasoned that it would be improper to "blue pencil" an entirely new term into an agreement to which neither of the parties agreed. *Id.* at 160, 621 S.E.2d at 354.

In summary, based upon the sworn testimony of the Respondent; the clear and unambiguous terms of the Agreement, including the merger clause; the parol evidence rule; the S.C. Statute of Frauds; the legal requirements regarding a Covenant Not to Compete; and, the "blue pencil" rule, it was clear error for the trial judge to deny Appellants' motion for directed verdict at the conclusion of Respondent's case.

II. THE TRIAL COURT ERRED BY FAILING TO GRANT APPELLANTS' MOTION FOR DIRECTED VERDICT AFTER RESPONDENTS' CASE AS TO A BREACH OF A COVENANT NOT TO COMPETE.

For the same reasons set forth above, the trial judge erred by failing to grant Appellants' motion for directed verdict at the conclusion of Respondents' case, and give a curative instruction to the jury to disregard all testimony and evidence concerning a covenant not to compete.

III. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY THAT THEY COULD NOT CONSIDER AWARDING DAMAGES BASED UPON A BREACH OF A COVENANT NOT TO COMPETE CLAIM BECAUSE THE TRIAL JUDGE GRANTED APPELLANTS' MOTION FOR DIRECTED VERDICT AS TO THE COVENANT NOT TO COMPETE AFTER ALL THE TESTIMONY AND EVIDENCE HAD CONCLUDED.

Because the trial judge failed to grant Appellants' pre-trial motion to exclude Respondents' claim of a breach of a covenant not to compete, the jury heard and viewed evidence, throughout the trial, that Appellants were under a ten (10) year obligation not to compete. Appellants were prejudiced by this evidence.

Once the trial judge finally granted Appellants' motion for directed verdict as to the covenant not to compete cause of action, Appellants requested that the trial judge instruct the jury that they could not consider a covenant not to compete (R. p. 242, lns. 17-21). However, the trial judge found that because the jury could infer the Appellants intended not to compete and that Respondents did not argue perspective damages as a consequence of the breach of contract, that any additional charge may confuse the jury (R. p. 242, ln. 24 – p. 243, ln. 15). The Court's denial of this request and its reasoning thereof was erroneous.

The trial judge's only remedy was to instruct the jury, as a matter of law, that a non-compete agreement did not exist. Otherwise, the jury may have determined that Appellants were subject to a ten (10) year obligation not to compete. Moreover, despite Appellants best efforts in their arguments to the jury, Appellant has no way to "unring" the bell. The trial judge was under an obligation to instruct the jury, as a matter of law, that a non-compete did not exist, and therefore, they could not consider any evidence, testimony, or resulting damages therefrom.

IV. THE TRIAL COURT ERRED BY FAILING TO GRANT APPELLANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO RULE 50(B), *SCRCP,* AS TO HOWARD'S CLAIM FOR BREACH OF CONTRACT/DEBT COLLECTION.

Respondents admitted that they did not pay Appellants as required by the Contract according to Paragraph 2.2 of the Contract (R. p. 161, ln. 23 – p. 167, ln. 6). Respondents further admitted that the Contract provided that any unpaid portion of the purchase price was subject to an interest rate of two (2%) percent per year calculated on a monthly rate of 0.1667 (R. p. 167, lns. 7-10). Accordingly, Appellants provided certain and accurate damages in the amount of $213,314.34, including interest at 2.0%, which they sustained due to Respondents' breach of the contract (R. pp. 453-454).

A judgment notwithstanding the verdict should not be granted unless only one reasonable inference can be drawn from the evidence. *Brady Dev. Co. v. Town of Hilton Head Island,* 312 S.C. 73, 439 S.E.2d 266 (1993).

Pursuant to Respondents' admission as to the terms of payment, and Respondents' failure to pay as required by the Contract, the evidence of Appellants' damages are subject to only one reasonable inference. As a result, the trial judge erred by failing to grant Appellants' motion for

judgment notwithstanding the verdict as to its claim for breach of contract/debt collection in the amount of $213,314.34.

V. THE TRIAL COURT ERRED BY FAILING TO GRANT APPELLANTS' MOTION FOR A NEW TRIAL ABSOLUTE PURSUANT TO RULE 59, *SCRCP,* AS TO THE AMOUNT OF THE VERDICT AWARDED TO RESPONDENTS.

In South Carolina, a trial judge may grant a new trial following a jury verdict under the Thirteenth Juror Doctrine. The doctrine "entitles the judge to sit, in essence, as the thirteenth juror when he finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts.' " *Norton v. Norfolk Southern Railway Co.,* 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002), *citing Folkens v. Hunt,* 300 S.C. 251, 387 S.E.2d 265 (1990). As the thirteenth juror, the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict. *Id.* Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. *Norton,* 350 S.C. at 478, 567 S.E.2d at 854. This Court's review is limited to consideration of whether evidence exists to support the trial court's order. *Id.* at 478–79, 567 S.E.2d at 854.

The trial court *must* grant a new trial absolute "if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motive." *Knoke v. South Carolina Dep't of Parks, Recreation and Tourism,* 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996). Alternatively, the trial court *may* grant a new trial absolute when, sitting as the thirteenth juror, it concludes the jury's verdict is not supported by the evidence. *See Vinson v. Hartley,* 324 S.C. 389, 402, 477 S.E.2d 715, 722 (Ct.App.1996). On appeal, the appellate court reviews a

denial of a new trial motion for an abuse of discretion. *See Vinson,* 324 S.C. at 403–06, 477 S.E.2d at 722–23. The appellate court will not reverse the trial court's decision unless it is controlled by an error of law or is not supported by the evidence. *See Id. Duncan v. Hampton Cty. Sch. Dist. No. 2*, 335 S.C. 535, 547, 517 S.E.2d 449, 455 (Ct. App. 1999).

Respondents relied upon damages presented through Exhibits Three (3) (R. pp. 263-266) and Four (4) (R. p. 290). The amounts presented therein were $370,445.26 and $123,000.00. As a result, despite the unreliability of this evidence, the best verdict Respondents could receive was $493,445.26. The jury awarded Appellants $690,589.00.

Moreover, Respondents only requested $377,000.00 in their closing argument (R. p. 239, lns. 22-24). Even the trial judge stated, "I will tell you that this jury verdict is much larger than I would have anticipated, frankly." (R. p. 247, lns. 1-3).

The verdict was $313,589.00 more than the Respondents requested even given the uncertainty and unreliability of their own damages. The jury clearly ignored the evidence and the law regarding Respondents' burden of proving their damages by a preponderance of the evidence. The only rational conclusion is this verdict was the result of passion or caprice, rather than a verdict based upon the competent and credible evidence. The trial judge erred by failing to grant Appellants' motion for a new trial absolute.

VI. THE TRIAL COURT ERRED BY FAILING TO GRANT APPELLANTS' MOTION FOR A NEW TRIAL *NISI REMITTITUR*, PURSUANT TO RULE 59, *SCRCP*, AS TO THE AMOUNT OF THE VERDICT AWARDED TO RESPONDENTS.

A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is "merely excessive," although not motivated by considerations such as passion, caprice, or prejudice. In contrast, if the amount of the verdict is "grossly excessive," so

as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute, rather than a new trial *nisi remittitur*. *Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 309, 578 S.E.2d 16, 25 (Ct. App. 2002), *aff'd*, 362 S.C. 377, 608 S.E.2d 573 (2005).

Even if the trial judge did not err in finding this verdict "grossly excessive," the trial judge erred by failing to reduce Respondents' verdict to an amount that conformed to the evidence. Respondents requested the amount of $377,000.00 twice during their closing argument. The verdict of $690,589.00 was excessive. It was clear error not to reduce the verdict accordingly.

VII. THE TRIAL COURT ERRED BY FAILING TO AWARD APPELLANTS' MOTION FOR A NEW TRIAL ABSOLUTE, PURSUANT TO RULE 59, *SCRCP*, AS TO THE VERDICT AWARDED TO APPELLANTS.

The jury awarded Appellants the amount of $3,360.00 pursuant to the unpaid invoices for repairs owed by Respondents to High-Lite. The jury ignored the competent evidence of Appellants' damages due to Respondents breach of the contract. Respondent admitted he did not pay Howard as required by the Contract and admitted the amounts he owed Howard. Furthermore, in closing arguments, Respondents *admitted* they owed Appellants approximately $257,000.00 (R. p. 239, lns. 3-6). As a result, the jury's verdict was grossly inadequate, and shocks the conscience. On this basis, Appellants are entitled to a new trial absolute.

VIII. THE TRIAL COURT ERRED BY FAILING TO GRANT APPELLANTS' MOTION FOR A NEW TRIAL *NISI ADDITUR*, PURSUANT TO RULE 59, *SCRCP*, AS TO THE VERDICT AWARDED TO APPELLANTS.

Even if this Court were to affirm the trial judge's denial of Appellants' request for a new trial absolute, the trial judge erred by failing to grant Appellants' motion for a new trial *nisi additur* based upon the inadequacy of the verdict in the amount of $3,360.00.

IX. THE TRIAL COURT ERRED BY ALLOWING THE ADMISSION OF RESPONDENTS' ALLEGED DAMAGES THROUGH EXHIBITS THREE (3) AND FOUR (4) BECAUSE THE INFORMATION CONTAINED THEREIN COULD NOT BE AUTHENTICATED BY RESPONDENTS AND WAS TOO SPECULATIVE TO CONSTITUTE RELIABLE EVIDENCE.

Appellants objected to the admissibility of Plaintiff's Exhibits three (3) (R. p. 263-266) and four (4) (R. p. 290) on the basis that Wiener could not authenticate the documents because the information contained therein was generated from Appellants' bank statements. Therefore, Wiener could not independently verify the information contained in those exhibits. (R. p. 115, ln. 19 - p. 116, ln. 13; R. p. 139, lns. 9-13). The trial judge overruled Appellants' objections.

The admission of evidence is within the sound discretion of the trial judge, and absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal. *Hofer v. St. Clair,* 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. *Conner v. City of Forest Acres,* 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005); *Carlyle v. Tuomey Hosp.,* 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991).

To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.,* there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence. *Conner,* 363 S.C. at 467, 611 S.E.2d at 908; *Hanahan v. Simpson,* 326 S.C. 140, 156, 485 S.E.2d 903, 911 (1997). *Vaught v. A.O. Hardee & Sons, Inc.,* 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005).

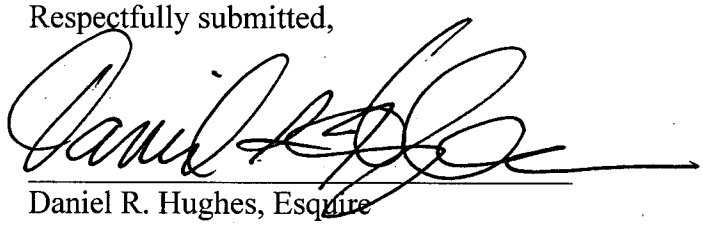
Exhibits 3 and 4 were nothing more than Respondents' guesswork as to their damages, and were presented as factual conclusions in Respondents' case in chief. It was impossible for

Respondents to independently verify the information contained in Exhibits 3 and 4 – a fact which they admit to. The admission of the evidence was in error, and it resulted in prejudice to the Appellants. Accordingly, the trial judge erred in admitting Exhibits 3 and 4 into evidence.

CONCLUSION

For the foregoing reasons, the trial court committed reversible error, and the Appellants request this Court to reverse and remand the case accordingly.

Respectfully submitted,



May 12, 2017

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No.: 2015-002648

ABC Amusements, Inc., and Scott Wiener ..... Respondents,

v.

Michael O. Howard, High-Lite Rides, Inc., and MGR Rides, LLC ..... Appellants.

CERTIFICATE OF COUNSEL

I certify that I have served the Final Brief of Appellants and that it complies with Rule 211, SCACR.

May 12, 2017

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