

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

RECEIVED

JUN 12 2017

SC Court of Appeals

ABC Amusements, Inc., and Scott Wiener Respondents,

vs.

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

FINAL REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

ARGUMENT 1

CONCLUSION 6

TABLE OF AUTHORITIES

<i>Austin v. Stokes-Craven Holding Corp.</i> , 691 S.E.2d (S.C. 2010)	2
<i>Jones v. Ridgely Communications, Inc.</i> , 304 S.C. 452, 405 S.E.2d 402 (1991)	3

ARGUMENT

Appellants offer the following points of clarification and rebuttal to the arguments raised by Respondents.

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

- III. **THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY THAT THEY COULD NOT CONSIDER AWARDED 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?**

Respondents' failure to prove the existence of a covenant not to compete was never a fact in dispute. Yet, Respondents argue that "[t]he Court correctly identified the fact that evidence of a non-compete had been presented by Respondents and therefore the Court correctly denied Appellants' Motion for a Directed Verdict and instead took the same under advisement *to allow for the admissibility of additional testimony and evidence.*" (Respondent's Brief, p. 10) (italics added). This argument is simply wrong. Respondents and the Court rely upon the fact that the Agreement between the parties alluded to a covenant not to compete as a basis to allow testimony to allow the jury the ability to determine the parties' intent. However, there was no covenant not to compete, and Respondents and the Court failed to identify *any* of the mandatory terms of a non-compete Agreement that would allow it to survive a directed verdict motion, i.e., (1) reasonableness as to time and territory; (2) supported by valuable consideration; (3) reasonableness from the standpoint of public policy; and, (4) legitimately necessary for the

Respondents' protection. In fact, *even before the trial began*, Respondents conceded, and the Court found, that a separate writing containing a covenant not to compete did not exist.

Therefore, it was clear error and an abuse of discretion for the judge to (1) allow Respondent to testify regarding what he considered to be the "terms" of the covenant not to compete; (2) to deny Appellants' directed verdict motion at the conclusion of Respondent's case in chief; and (3) to deny Appellants' request to instruct the jury that, (a) as a matter of law there was no covenant not to compete and (b) they were to disregard any evidence pertaining to a covenant not to compete, including any damages resulting therefrom, in their deliberations. The foregoing errors were prejudicial, not harmless.

After allowing evidence of a covenant not to compete throughout the trial, the trial judge finally granted Appellants' motion for directed verdict without providing a basis for his decision. The trial judge also found that "no damages can flow from a breach of a separate and distinct covenant not to compete." (R. p. 236). Nevertheless, the trial judge refused to charge the jury that they could not consider damages from a breach of a separate non-compete agreement on the basis that "the effect of finding that it was void and unenforceable is that they cannot claim perspective damages for 10 years or request injunctive relief precluding him from working. However, they can consider, if they determine that the intention of the parties was that he not compete and/or that he refer all new business to them, that they can consider that as an element of damages." (R. pp. 242-243).

Appellants sustained prejudice by the admission of improper evidence throughout the trial, and there is a reasonable probability, given the amount of the verdict, that the jury's verdict was influenced by the improper evidence. *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C.

22, 691 S.E.2d 135 (2010) (to demonstrate prejudice based on an evidentiary ruling, there must be a reasonable probability they jury's verdict was influenced by the challenged evidence or lack thereof).

Furthermore, Appellants sustained prejudiced by the Court's refusal to instruct the jury that they could not consider a breach of a covenant not to compete and any damages that resulted. There are two flaws with the trial court's reasoning for disallowing the Appellants' requested jury instruction. First, the trial judge presumes that the jury knows they could not consider perspective damages. Without an instruction to this effect, the jury did not know that Respondents were not entitled to perspective damages. The jury very well may have determined that Respondents were entitled to future damages. Second, as set forth above, whether or not one party is precluded from competing against another must be established by a valid non-compete agreement. Since there was no such agreement, the parties' intent was no longer an issue for the jury.

Our Courts hold that when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error. *Jones v. Ridgely Communications, Inc.*, 304 S.C. 452, 405 S.E.2d 402 (1991). Having allowed the jury to hear testimony regarding a covenant not to compete, and then finding that there was not a covenant not to compete, the Court erred by failing to charge the jury as to this finding, and also that they were precluded from considering any evidence of a covenant not to compete and assessing any future damages thereto.

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

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

Respondents were awarded \$690,589.00 despite asking the jury for \$377,000.00 in damages. Respondents argue that its "request for damages in the amount of \$377,000.00 presumed that Respondents would also be entitled to ownership of the amusement rides." (Respondent's Brief, p. 14). This argument is flawed. Respondents' presumptions do no matter. The jury verdict must be based upon what the Respondents prove, and the Respondents failed to prove their damages and that they owned the equipment. Therefore, the only rational conclusion is that this verdict was the result of passion or caprice, or, in the alternative, should have been reduced by the trial judge to conform to the evidence.

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

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

Respondents argue that in reaching the verdict, "the jury, more or less, appears to take into account all three requests in their Verdict." (Respondent's Brief, p. 17) This opinion is unsupported by the evidence. The Respondents failure to pay Appellants the payments due pursuant to the terms of the Agreement was an *uncontested* fact admitted to by the Respondents. Respondents admitted they owed Appellants approximately \$257,000.00. (R. p. 239). The trial court erred by not granting Appellant's motion for a directed verdict as to their damages for

Respondents' failure to make payments. At that point, the trial judge could have offset the amount of the award to Respondents by the amount owed to Appellants. Respondents' position that they were excused from payment because Appellants breached the contract first (Respondent's Brief, p. 13) does not entitle Respondents to be excused to pay the uncontroverted debt Respondents owed to Appellants.

The jury only awarded Respondents \$3,360.00 for the unpaid invoices due Appellant High-Lite Rides, Inc. for equipment repairs. Therefore, the jury's award to Appellants was grossly inadequate and shocked the conscience, or, in the alternative, was an inadequate verdict based upon the uncontradicted evidence at trial. It was error not to grant a new trial absolute, or, in the alternative, to increase the verdict in Appellants' favor by \$257,000.00 to conform to the uncontroverted evidence.

IX. DID THE TRIAL COURT ERR 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?

Respondents argue that they "were ultimately successful in authenticating Exhibit 3."

Respondents never authenticated Exhibits 3 and 4. Exhibits 3 and 4 were summaries taken from Appellant Howard's bank records that were not yet in evidence at the time Exhibits 3 and 4 were introduced. Only Mike Howard could authenticate the records, and Appellant could have authenticated the records through him, but chose not to do so. Nevertheless, over Appellants' objection, the Court allowed Respondent to introduce summaries of records of which he had no first-hand knowledge on the basis that the records were produced by Appellant through discovery. Accordingly, the admission of Exhibits 3 and 4 was error. Furthermore, Respondents argue that Appellants fail to identify any prejudice by the admission of Exhibits 3 and 4. This

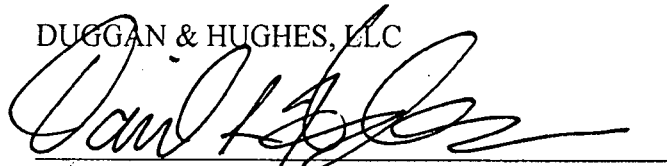
argument is also flawed. Appellants fully demonstrated the inherent unreliability of both Exhibits, which were merely Respondents' speculative guesses as to their damages.

CONCLUSION

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

Respectfully submitted,

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Dated: June 9, 2017
Greer, South Carolina

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Robin B. Stilwell, Circuit Court Judge

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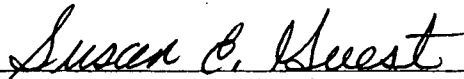
vs.

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

PROOF OF SERVICE

I certify that I served the Motion to Allow Appellant to File Final Reply Brief AND Final Reply Brief of Appellants upon ABC Amusements, Inc. and Scott Wiener, by way of their attorney, by depositing a copy of same in the United States mail, postage prepaid, addressed as follows:

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SC Court of Appeals

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Re: ABC Amusements, Inc., and Scott Wiener v. Michael O. Howard, High-Lite
Rides, Inc., and MGR Rides, LLC [Appeal]
Appellate Case No.: 2015-002648

Dear Clerk:

Enclosed please find the original and two copies of the Motion to Allow Appellant to File Final Reply Brief AND the Final Reply Brief of Appellant (one unbound original, fourteen bound copies), including Proof of Service for same in regard to the above-referenced matter. I am also enclosing this firm's check made payable to you in the amount of \$25.00 to cover your cost for filing the Motion. Please return our clocked copy in the self-addressed prepaid envelope provided.

Furthermore, please be advised that by copy of this letter I am serving same upon opposing counsel.

Sincerely,

DUGGAN & HUGHES, LLC



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Paralegal

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Enclosures

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