THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Richard B. Ness, Special Referee

Case No. 2013-CP-09-00083
Appellant Case No. 2016-001867

Bonnie Riley, Appellant,

v.

Michael Outlaw, Respondent.

APPELLANT'S FINAL BRIEF

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STATEMENT OF THE CASE

Plaintiff, Bonnie Riley, filed the Summons and Complaint in this matter on April 19, 2013, seeking an order requiring the Defendant to remove equipment from her property and to permanently prohibit the Defendant from entering her property.[1] The Defendant, Michael Outlaw, filed his Answer and Counterclaim in this matter on June 25, 2013, in which he denied the allegations of the Complaint and requested the enforcement of a verbal contract for the transfer of land that was allegedly entered into by the parties sometimes in 2007. The Plaintiff filed her reply to the Counterclaim on July 13, 2013, asserting a general denial of the allegations in the Counterclaim. [R pp 9- 20].

The matter was referred to Richard B. Ness by a Consent Order of Reference filed on August 21, 2014, giving him full rights to sit as the trial judge in this matter. A final hearing was held before Special Referee Ness on May 20, 2016, whereby he accepted testimony and evidence. Special Referee Ness entered a Final Order of Judgment on August 18, 2016. [R pp 1 - 5].

[1] In the Complaint, Plaintiff also sought punitive damages but did not pursue this issue at trial. Therefore, the issues of punitive damages is abandoned.

The trial transcript in the above-captioned matter was received from the Court Reporter via email on October 31, 2016.

FACTS[2]

The Plaintiff and Defendants are neighbors who own adjoining property in the County of Calhoun, State of South Carolina, and they have known each other for many years. Plaintiff and Defendant's father were involved in a more than social relationship at the time the Plaintiff and Defendant commenced the transaction which gave rise to this lawsuit. [R pp 95 L 22 - 96 L6]. The disputed property in this case is described as Parcel "C" on a certain plat prepared by Edisto Engineers & Surveyors, dated May 16, 2008 and revised December 17, 2008, consisting of 1.19 acres of land (hereinafter referred to as the "disputed property"). [R pp 1 - 5; R p 162].

At the time of the trial of this matter, Plaintiff was 74 years of age. [R p 34 L 11 - 12]. During the year 2007, Plaintiff and Defendant alleged entered a verbal agreement, whereby the Plaintiff agreed to transfer the disputed property at an unspecified time in the future as consideration for Defendants agreement to maintain the disputed property and the lawn of her primary home. According to the Defendant's testimony, the verbal agreement evolved as follows:

[2] Unless otherwise cited, the general facts relied upon in this section are taken from the Final Order of Judgment as found by Special Referee Ness and the Transcript of the Proceedings. All the pertinent facts are not included in this section. As allowed by the appellate court rules, additional facts will be cited and reference within the arguments as they become relevant.

> My father called me one day. I can't tell you when it was or what date, and he said, 'I need to talk with you a little bit. Me and Bonnie wants [sic] to talk to you.' I was walking down, so they walked down. They'd come down on the side of the land there and me and my son Matthew was out there. We went over to talk to them. Said, 'I got a deal, a proposition I want to give you." I said, 'Okay.'

[R p 93 L 18-25]. Per the Defendant, Plaintiff then said the following: 'I am getting old and I can't cut this grass. . . I just need some help. . . I'm going to give you this acre of land right here.' [R p 94 L 1-4]. In consideration for the land, both the Defendant and the Plaintiff testified that the verbal agreement required Defendant to cut the grass in return for the property, which was to be deeded at some undetermined point in the future. [R pp 93 L 2 - 96 L 25].

This dispute arose when the Plaintiff decided not to deed the property to the Defendant because she was not pleased with the way the Defendant was maintaining the property. [R pp 46 L 6 - 49 L 23]. Defendant testified that he, directly or indirectly, cut grass on the disputed property every two weeks starting sometimes in 2007 and continuing to the trial of the matter. [R pp 82 L 17 - 83 L 23]. The Defendant could not produce any witnesses or documentation to substantiate is claim that he cut the grass on the disputed property for the years he claimed. [R pp 83 L 2 - 86 L 25].

Procedurally, the Defendant did not call any witnesses and did submit any evidence once the Plaintiff's case in chief was completed.[3]

ARGUMENTS

A. THE TRIAL JUDGE ERRED IN GRANTING THE DEFENDANT A JUDGMENT BASED UPON THE THEORY OF QUANTUM MERUIT BECAUSE THE DEFENDANT OFFERED NO PROOF TO SUPPORT RECOVERY UNDER THE THEORY OF QUANTUM MERUIT.

[3]Defendant's counsel cross-examined Plaintiff and Defendant during the Plaintiff's case-in-chief, and his counsel admitted documentary evidence during the case-in-chief. However, when Plaintiff's case was finished, the Defendant did not call any witnesses nor offer an evidence to support his counterclaim.

The Defendant's pleadings in this matter asserts two counterclaims: (1) a claim based upon a verbal contract to deed the disputed property and (2) a claim based upon the theory of quantum meruit. [R pp 15 - 18]. The trial judgment found in favor of the Defendant on both claims, but alluded to the quantum meruit claim as the all-inclusive claim. Therefore, this brief will address the quantum meruit claim first.

The equitable doctrine of quantum meruit allows an aggrieved party to recover for unjust enrichment. *Columbia Wholesale Co., Inc. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). To prevail on this theory, a plaintiff must establish the following three elements: (1) a benefit conferred by plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for her to retain it without paying its value. *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8, 532 S.E.2d 868, 872 (2000) (quoting United States Rubber Prods., Inc. v. Town of Batesburg, 183 S.C. 49, 55, 190 S.E. 120, 126 (1937)).* In the case before this Court, the Defendant's proof fails on all three elements because at the close of the Plaintiff's case, the Defendant did not put any evidence to support his counterclaim of quantum meruit. When the Plaintiff finished her case-in-chief, the Defendant basically failed to go forward on his counterclaims. [R pp 91 - 111]. Therefore, as a matter of law, the Defendant's quantum meruit claim must fail as a matter of law for his failure to offer proof. See, *Hawkins v. City of Greenville, 358 S.C. 280 (2004)* (lack of proof caused the Plaintiff's case to fail).[4] *E.g. First State Sav. and Loan v. Phelps, 299 S.C. 441, 449, 385 S.E.2d 821, 826 (1989)* (any error in exclusion of defendant's proffered testimony on damages was harmless because defendant failed to establish counterclaim that plaintiff bank committed either a

fraud or breached an express oral warranty in sale of horses).

The Defendant will probably argue that he submitted evidence of his counterclaims during the Plaintiff's case-in-chief. Let's assume that this viable legal argument, i.e., to wit, that a Defendant can prove his counterclaims through the testimony during Plaintiff's case-in-chief. Even if the Court accepts the Defendant's expected argument, the Defendant's quantum meruit counterclaim would still fail because there is no evidence to support a finding that the retention of the benefit by the Plaintiff under circumstances that make it inequitable for her to retain it without paying its value. The trial judge in this case made fourteen findings of fact and not one of them found that it would be inequitable to allow the Plaintiff to receive the benefit of the law mowing without paying for it. [R pp 1-5]. To the contrary, the evidence showed that the Defendant had made full use of the disputed lot for several years, including using it to store his farm equipment. [R pp 85 L 14 - 86 L 25]. The testimony showed that Defendant had absolute use and control of the property for all the years he allegedly mowed the grass. [R pp 35 L 14 - 36 L 4, p 38 L 10 - 24, pp 85 L 14 - 90 L 5, pp 102 L 25 - 103 L 9, P 117 l 2 - 11]. The Defendant claimed that the value of his services were $100 each time he mowed the grass, which was done twice a month. Clearly, Defendant's absolute control and use of the property could have exceeded $200.00 per month—we do not know because the Defendant did not offer any proof on this critical factual point. Thus, even if the Defendant relies upon the evidence deduced during the Plaintiff's case-

[4]The cited case involved one for summary judgment. Plaintiff contends that the "lack of proof" standard applies just the same in the case now before the Court.

in-chief, his quantum meruit counterclaim must fail as a matter of law because there is no evidence to support the third prong of the quantum meruit claim.

B. THE TRIAL JUDGE ERR IN FINDING THAT THE VERBAL CONTRACT FOR THE SALE OF THE SALE IN QUESTION WAS AN ENFORCEABE CONTRACT AND THE COURT DID NOT HAVE JURISDICTION TO HEAR THE MATTER.

Defendant's first counterclaim asserts basically a breach of contract claim. Defendant asserts that he had a valid verbal contract with the Plaintiff that the Plaintiff should be forced to sign over her land because his partial or full performance. [R pp 15 - 18]. This contract theory is not viable under the circumstances for several reasons.

First, the contract theory failed procedurally because the Defendant failed to offer any evidence to support his contract claim. For this reason alone, the Defendant's contract theory must fail. However, assuming the Court concludes that the evidence from Plaintiff's case-in-chief supports Defendant's contract claim, then the Defendant's contract claim must still fail because he failed to establish by proof all the essential elements of a binding contract.

To recover for a breach of contract, the plaintiff must prove: (1) a binding contract; (2) a breach of contract; and (3) damages proximately resulting from the breach. *Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962).* Further, to prevail under the contract theory and avoid the application of the Statute of Frauds, Defendant must prove each element of the contract by clear, cogent, and convincing evidence. *See, Brown v. Graham, 242 S.C. 491, 493, 131 S.E.2d 421, 422 (1963)* (holding contracts to make a will "are regarded with suspicion and will not be

sustained unless established by definite, clear, cogent and convincing evidence"); *Knight v. Stroud, 214 S.C. 437, 441, 53 S.E.2d 72, 73 (1949)* (giving burden of proof required to establish oral gift). In the case-at-bar, the trial judge did not use the clear and convincing standard. [R pp 1 - 5]. Moreover, the Defendant's failure to offer any evidence resulted in him not putting forth any evidence to clearly and convincingly establish the terms of the contract. For example, not one piece of evidence establishes at what point the Plaintiff was required to deed the disputed property to the Plaintiff. How many times was the Defendant required to cut the before he was entitled to a deed? Any contract for an interest in land or any agreement that is not to be performed within one year must be in writing and signed by the party against whom it is seeking to be enforced. *S.C. Code § 32-3-10(4)*. Failure to put such a contract in writing renders it void. *S.C. Code § 27-35-20.*

As a final fatal flaw, the Defendant did not have a legal right even to bring the counterclaim to enforce allege verbal contract concerning the disputed land because *S.C. Code § 32-3-10* prevents the action from even being brought., i.e., filed or heard, unless there is a writing bearing the Plaintiff's signature. Plaintiff asserts that this prohibition is jurisdictional, and she further asserts for the first time on appeal that the trial court did not have subject matter jurisdiction to even hear the Defendant's counterclaim. *See, In re November 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 637, 686 S.E.2d 683, 686 (2009) ("Issues related to subject matter jurisdiction may be raised at any time."); *Arnal v. Fraser*, 371 S.C. 512, 517 n.2, 641 S.E.2d 419, 421, n.2 (2007); *Carter v. State*, 329 S.C. 355, 362, 495 S.E.2d 773, 777 (1998).

The necessary elements of a contract are offer, acceptance, and valuable consideration. *Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003).* Valuable consideration may consist of "some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998).* With certain exceptions, a contract need not be in writing to be enforceable. *Gaskins v. Firemen's Ins. Co. of Newark, N.J.*, 206 S.C. 213, 216, 33 S.E.2d 498, 499 (1945) (noting that if there is a meeting of the minds with regard to the essential elements of a contract, it is immaterial whether the contract is written or oral).

The trial judge stated in the Final Order of Judgment that the verbal agreement could be taken from the purview of the Statute of Frauds due to partial or full performance. As a first and novel response to the trial judge, Appellant asserts that the common-law exceptions to the Statute of Frauds cannot apply because the statutory provisions of *S.C. Code Ann.* § 32-3-10 prevents the action from even being brought or commenced. Therefore, if an action cannot be brought due to a statutory impediment, then no common-law exceptions can be attached. But even if this Court rejects this novel argument, then Appellant asserts the following: "An oral contract within the Statute of Frauds may be taken out by performance where one party does some act essential to performance of the agreement resulting in loss to himself and benefit to the other." *Graham v. Prince, 293 S.C. 77, 81, 358 S.E.2d 714, 717 (Ct. App. 1987*). However, this exception would not apply in the case before the Court because the Defendant failed to prove the essence of the allege oral agreement and because he failed to prove that he fully performed the contract by clear and convincing evidence. How can the Defendant prove that he performed the contract when he failed to prove the

existence and terms of the contract? Appellant submits that he cannot. For the reason stated, Appellant asserts that the exception to the Statute of Fraud to the facts of this case are not applicable.

C. THE TRIAL JUDGE ERRED IN GRANTING THE DEFENDANT A JUDGMENT WHERE THE MEASURE OF DAMAGES WERE SPECULATIVE AT BEST?

Even if the Defendant survives the legal hurdle as outlined in the arguments above, Appellant asserts that the trial judge erred in granting Defendant an award of damages because the testimony concerning his damages were speculative at best. For example, Defendant, during the Plaintiff's case-in-chief, testified as follows:

> Q: All right. And how long did you cut her yard?
>
> A: Jay, I hadn't got the dates in front of me, but I'm guessing three and a half years/four –
>
> Q: Okay.
>
> A: -- something like that.

[R p 93 L 2 - 6]. He further testified as follows:

> Q: We'll, what -- you put $4,800 on it based on all this information?
>
> A: Right. Uh-huh (affirmative).
>
> Q: And again, admittedly, there's some guess work involved. Is that correct?
>
> A: Right.

[R p 126 L 12-25].

The general rule for recovery of damages mandates that the fact finder determine the amount of damages with reasonable certainty from the evidence. *Minter v. GOCT, Inc., 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996).* The amount of damages cannot be left to conjecture, guess, or speculation; however, mathematical certainty is not required. *Id.; see Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 646, 529 S.E.2d 764, 767 (Ct. App. 2000)* ("The amount of damages need not be proved with mathematical certainty. The evidence, however, should be such that a court or jury can reasonably determine an appropriate amount."); *Minter, 322 S.C. at 528, 473 S.E.2d at 70* ("While proof of mathematical certainty is not required, the amount of damages cannot be left to conjecture, guess, or speculation"). To warrant such recovery, damages must be established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative. *South Carolina Fin. Corp. of Anderson v. West Side Fin. Co., 236 S.C. 109, 122-23, 133 S.E.2d 329, 336 (1960)).* In this case, the trial court violated all of the above-cited general principles and based damages on the mere speculation of the Defendant. The Defendant did not admit a single piece of documentation evidence to support his damages claim. He allegedly paid others to cut the grass but not one of those individuals were called to testify. As a matter of fact, the Defendant did not admit a scintilla of evidence to support his claim for damages—he offered only his speculative testimony during the Plaintiff's case-in-chief. Therefore, this Court should not allow the Defendant to recovered the awarded damages because such damages have not been proven with reasonable certainty.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and remand the matter to the trial court with instructions to dismiss the Defendant's counterclaims or for a new trial.

At Orangeburg, SC

Dated: August 4th, 2017

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCAR.

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