THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FOM BERKELEY COUNTY
COURT OF COMMON PLEAS

R. MARKLEY DENNIS, CIRCUIT JUDGE

Case No: 13-CP-08-0149

St. Stephen Family Dentistry, LLC,

Respondent,

v.

Linda Gregg and Douglas Allen Kaufman,

Appellants.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

April 3, 2015

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STATEMENT OF THE CASE

This appeal arises from an Order of the Circuit Court awarding damages to Respondent from Appellants both previously found in default. The case began on January 22, 2013, when Respondent filed its Complaint seeking monetary damages and the setting aside of a transfer of property from Appellant Linda Gregg (Gregg) to Appellant Douglas Allen Kaufman (Kaufman), fraudulently executed on June 13, 2012. (RA 9).

Appellants' brief intimates that service was effected sometime later than it actually was and states that the Order of Default was entered less than thirty days after service. (Appellants' Brief at pg. 2). Appellants are factually incorrect. Service was effected March 2, 2013. (RA 15). Despite proper service, Appellants failed to answer or otherwise plead. The Order of Default was properly entered on April 12, 2013. (RA 1). Regardless, Appellants did not move to set aside the Order of Default and did not appeal the entry of the Order of Default.

At the damages hearing on October 22, 2013, Appellants conceded that they received proper notice of the hearing and waived any objections they may have had. (December 2013 Order at pgs. 1-2). Respondent presented testamentary and documentary

evidence supporting its claim for actual and punitive damages. (RA 20). Appellants were represented by counsel who participated as permitted by Rule 55(b)(2), SCRCP. (RA 20). The damages hearing resulted in the Order signed November 29, 2013, and filed with the Berkeley County Clerk of Court on December 4, 2013, entering judgment against Appellants Gregg and Kaufman, jointly and severally, for $284,371.47 in actual damages, and $285,000 in punitive damages and setting aside the property transfer from Gregg to Kaufman. (December 2013 Order, RA 5-7). Appellants are only appealing the award of damages and not the setting aside of the property transfer.

STATEMENT OF FACTS

Respondent adopts the factual findings of the trial court at pages 2 through 4 of the December 2013 Order *in toto* (RA 3-5) as follows:

Respondent, St. Stephen Family Dentistry, LLC, is a dental practice located in St. Stephen, South Carolina, owned by Tristan Cordray, DDS (Dr. Cordray). Gregg had been employed by Plaintiff from 2007 when St. Stephen's Family Dentistry was purchased by Dr. Cordray, until January 20, 2011. Gregg was the office manager for Plaintiff and stood in a position of trust and confidence to Respondent.

On January 20, 2011, Dr. Cordray opened a letter from Chase Cardmember Services addressed to Stephen Family Dentistry, enclosing a check from The SC State Employees Dental Benefit Plan made to St. Stephen Family Dentistry and endorsed to a Chase account (RA 73). The letter indicated that Chase does not accept third party checks. Dr. Cordray called Chase Cardmember Services and learned that the account used on the endorsement belonged to Gregg. When Dr. Cordray confronted Gregg with

this information she asked, "Do you think I should leave?" Gregg then left and never returned to the practice and refused to accept any phone calls from Dr. Cordray.

Alarmed, Dr. Cordray retained the services of an attorney and subsequently, the services of Richard Livingston, CPA/CFF, CFE, CVA, a forensic accountant with the firm of Dixson Hughes Goodman LLP, to perform an investigation regarding possible misappropriation of funds by Gregg. Using documents obtained by a search warrant issued in a criminal proceeding commenced against Gregg, Mr. Livingston's forensic investigation revealed that Gregg developed a scheme whereby she intercepted checks payable to the St. Stephens Family Practice and endorsed them for deposit directly to pay her living expenses. In this way Gregg misappropriated funds for her benefit and that of Kaufman in an amount of at least $139,363.20. (RA 68). The documents reviewed during the forensic investigation revealed that Gregg and Kaufman were using credit cards in part to take lavish vacations to Pebble Beach, California, Disney World, and other locations, and to make payments on Defendant Gregg's personal vehicle, personal cell phone account, mortgage, and personal credit card accounts (RA 512, 531 and 684).

Mr. Livingston testified his investigation did not include any funds that patients (as contrasted to insurance companies) paid directly to Respondent. Dr. Cordray testified that judging from historical records, he estimated Linda Gregg misappropriated $50,000 per year from patients, in addition to the $139,363.20 taken from insurance companies during the three and a half years she operated her scheme. In addition to endorsing checks made to Respondent and using them for payment of her own debt, Gregg overbilled patients' insurer carriers for procedures that were not performed or procedures that were more expensive than the procedures actually performed. Unwittingly, Respondent

received $20,038.78 in payments as a result of Gregg's fraudulent scheme. Plaintiff was forced to reimburse insurers for all such overpayments deposited in its account and to notify patients that their insurers had been overbilled. Appellant did not seek reimbursement for these sums.

As a consequence of Appellants' wrongdoing, Respondent had to perform free services and was forced to waive any payments due from patients in the amount of $35,000. As a further consequence, Respondent lost numerous patients. Dr. Cordray estimates the practice lost income in an amount of $50,000 for the first six months following the discovery of the theft, and an estimated $10,000 to $15,000 per year after July 2011.

As part of the forensic investigation Mr. Livingston reviewed Gregg's real and personal property records available at the Berkeley County Register of Deeds. The review revealed that in June 2012, after her scheme was discovered, Gregg conveyed her residence to her fiancé, Kaufman, through a Quit Claim Deed for $5.00 (RA 68). (This conveyance was set aside by the trial court and that ruling is not being appealed by Appellants.)

Respondent also had to expend large amounts of money in order to determine the extent of Gregg's scheme. Respondent expended $30,108.27 in accounting fees (RA 801). Additionally, Dr. Cordray testified that Plaintiff had to purchase new computers that could be used for the investigation and hired a paralegal to begin the investigation for a total cost in the range of $5,000 to $10,000.

ARGUMENT

Standard of Review

As reiterated by this Court in *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 202, 723 S.E.2d 597, 602 (Ct. App. 2012), an action in tort for damages is an action at law. In an action at law, the appellate court corrects errors of law, but affirms the trier of fact's factual findings ***unless no evidence reasonably supports those findings***. *Id. citing Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997) (emphasis added). The appellate courts grant the trial judge considerable discretion regarding the amount of damages, either actual or punitive. Review on appeal is limited to the correction of errors of law. This Court's task in reviewing the damages award "is not to weigh the evidence, but to determine if there is any evidence to support the damages award." *Id. citing Sheek v. Crimestoppers Alarm Sys.*, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989) and *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 310-11, 594 S.E.2d 867, 873 (Ct. App. 2004).

I. THE TRIAL COURT PROPERLY AWARDED DAMAGES AGAINST *BOTH* PARTIES IN DEFAULT.

The thrust of Appellants' argument appears to be that Appellant Kaufman does not believe he should be jointly and severally liable for the damages awarded by the Circuit Court. First, Appellant Kaufman is in default. The Complaint alleged causes of action against both Appellants for their roles in the fraudulent scheme including a cause of action against Kaufman for aiding and abetting Gregg's breach of fiduciary duty.

By failing to answer or otherwise plead and by failing to challenge the Order of Default, Appellant Kaufman relinquished any right he may have had to contest his

liability for the acts and omissions alleged in the Complaint. In *Doe v. S.B.M.*, this Court reiterated the rule that "[in] a default action, the default judgment settles the issue of liability." *Doe v. S.B.M.*, 327 S.C. 352, 357, 488 S.E.2d 878, 881 (Ct. App. 1997) (*quoting Ammons v. Hood*, 288 S.C. 278, 341 S.E.2d 816 (Ct. App. 1986). There, this Court affirmed a trial court's refusal to allow a defaulted defendant to inquire into matters concerning liability at a damages hearing. Here too, Kaufman's attempt to focus the Appellate Court's attention on whether Kaufman knowingly participated in Gregg's breach of fiduciary should be unavailing. Had he wished to contest his participation in the scheme or his liability, he could have simply answered timely. However, that legal ship has long since sailed, and, Kaufman lost his opportunity to contest his liability when he defaulted. Just as in *Doe*, the sole question before the trial court was the amount of damages to be awarded and Kaufman is not entitled to rehash the issue of his liability. Moreover, even in Appellants' brief, Kaufman does not actually raise the issue of whether he should have been held jointly and severally liable for the full extent of Respondent's losses. Instead, Kaufman argues the liability question of his knowing participation in the breach of Gregg's fiduciary duty. That question has been firmly settled by the Order of Default and should not be revisited here.

Second, at no time did Appellant Kaufman raise the issue of his lack of liability to the trial court. "It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved." *Holmes v. E. Cooper Cnty. Hosp., Inc.*, 408 S.C. 138, 160 n.16, 758 S.E.2d 483, 495 (2014) (*quoting Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006). "Objections not raised in the trial court cannot be relied on in the appellate court." *Doe v.*

S.B.M., 327 S.C. 352, 356, 488 S.E.2d 878, 880 (Ct. App. 1997) (*citing Wilson v. Clary*, 212 S.C. 250, 47 S.E.2d 618 (1948). "The duty is on the litigant to make a timely objection in order to preserve the right of review." *Id. citing Parks v. Morris Homes Corp.*, 245 S.C. 461, 141 S.E.2d 129 (1965). Here, while counsel for Kaufman asked questions about Kaufman's level of participation in Gregg's scheme, at no time did he make any argument against joint and several liability or suggest that Kaufman could be not be held liable for the full extent of Respondent's injuries. "As a general rule, an issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review. Issues not raised in the trial court will not be considered on appeal. . . . Matters not argued to or ruled on by the trial court are not preserved for review." *Doe v. S.B.M.*, 327 S.C. 352, 356, 488 S.E.2d 878, 881 (Ct. App. 1997) (citations omitted). In a similar situation, the Supreme Court refused to entertain a post damages hearing motion which asserted for the first time that that plaintiff was not the real party in interest because that defendant had failed to raise the issue prior to entry of default and had thus waived his right to contest the issue. *Bardoon Properties, NV v. Eidolon Corp.*, 326 S.C. 166, 168, 485 S.E.2d 371, 372 (1997), *cited in Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 202-03, 723 S.E.2d 597, 602 (Ct. App. 2012). Similarly here, because Kaufman failed to raise this issue to the trial court, he cannot now be heard on appeal.[1]

[1] Even if Kaufman had raised this issue before the trial court, the trial court still would have found him to be jointly and severally liable. In *Johnson v. Collins Entm't Co.*, 349 S.C. 613, 630-31, 564 S.E.2d 653, 662 (2002), the Supreme Court applied the "hand of one, the hand of all" theory to impose liability in a civil case on all defendants where the lessor defendants aided, abetted, and encouraged the more culpable defendants reasoning that the defendants shared in the illegal profits with knowledge of the unlawful actions.

II. THE EVIDENCE IN THE RECORD SUPPORTS THE TRIAL COURT'S DAMAGES AWARD.

Despite Appellants' insistence that the Circuit Court's award of damages was based on pure speculation, the record entirely supports the Court's award damages. As referenced above, in *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 202, 723 S.E.2d 597, 602 (Ct. App. 2012), this Court reiterated the rule that appellate courts grant the trial judge considerable discretion regarding the amount of damages, either actual or punitive, and, that review on appeal is limited to determining if there is any evidence to support the damages award." *Id. citing Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). Here, there is sufficient evidence to support both the award of actual and punitive damages including the testimony of Dr. Cordray, the testimony of the police investigator, the testimony of a forensic accountant and the submission of a forensic accounting report with exhibits that totals nearly 750 pages of reports and records.

A. The record contains sufficient evidence to support the award of actual damages.

The Circuit Court, in a detailed order, awarded actual damages against both Appellants in the amount of for $284,371.47. (RA 2-8). Specifically, the Court found that Respondent proved damages by a preponderance of the evidence as follows:

(1) $139,363.20 for embezzled funds. This amount was testified to by Respondent (RA 29 lines 12 – 14). It was also shown on the accountant's report entered into evidence as Plaintiff's Exhibit 1 at pg. 4 (RA 68) and testified to by the accountant. (RA 46, lines 9 -11). It was also supported by the complete report of the forensic accountant submitted on a disc as Plaintiff's Exhibit 2 (RA 65-801). Appellants do not dispute this component of

Respondent's actual damages (Appellant's Brief at pg. 8).

(2) $37,508.27 for the cost of investigating. This amount was verified by Respondent's testimony which included the amounts the company had to spend for new computers and a paralegal to help document the massive losses caused by Appellants' scheme. (RA 27 line 19 – pg. 9 line 8). The investigator, Mr. Livingston, also testified to his fees. (RA 52 lines 7 – 24). Support for this portion was also shown on Plaintiff's Exhibit 3. Appellants also do not dispute this component of Respondent's actual damages (Appellant's Brief at pg. 8).

(3) $35,000 for the write-off of accounts receivable. This amount was testified to by Respondent (RA 31, lines 3 – 18).

(4) $72,500 for loss of revenue due to loss of patients. This amount was testified to by Respondent (RA 30, line 3 – RA 31, line 1);

The trial court summarized the testimony concerning these last two components of the actual damages claim by explaining that Respondent testified Gregg misappropriated approximately $50,000 per year from patients, in addition to the $139,363.20 taken from insurance companies during the three and a half years she operated her scheme and that she had overbilled patients' insurer carriers for procedures that were not performed or procedures that were more expensive than the procedures actually performed. (RA 11). Unwittingly, Respondent received $20,038.78 in payments as a result of Gregg's fraudulent scheme and was forced to reimburse insurers for all such overpayments deposited in its account and to notify patients that their insurers had been overbilled. Respondent did not seek reimbursement for those sums largely because he had no way to estimate what those losses may have been.

Where Respondent ***was*** able to know what funds it had lost or to estimate reasonably the amount of the losses caused by the scheme, it offered the testimony of its principal, Dr. Cordray to support its claims for those losses. Dr. Cordray testified that his company was forced to waive payments due from patients in the amount of $35,000 (RA 11) and that he had lost income of $50,000 for the first six months following the discovery of the theft, and an estimated $10,000 to $15,000 per year after July 2011. *Id.* Dr. Corday, as the owner and operator of the Appellant business was perfectly competent to testify to his company's actual write-off's and to its lost patients/lost revenue.

Specifically, Dr. Cordray testified that he had to write off $35,000.00 in accounts receivable. His uncontroverted testimony is that he wrote off $35,000.00 and the trial court obviously found him credible because it awarded him that amount as a part of the actual damages award. Again, that testimony certainly meets the standard of review which is that this Court must affirm the trial court where "there is any evidence to support the damages award."

Dr. Cordray also estimated the number of patients he had lost as a result of the scheme and the resulting lost profits he estimated the Respondent's company lost. "The law does not require absolute certainty of data upon which lost profits are to be estimated, but all that is required is such reasonable certainty that damages may not be based wholly upon speculation and conjecture." *Petty v. Weyerhaeuser Co.*, 288 S.C. 349, 355, 342 S.E.2d 611, 615 (Ct. App. 1986) (*citing South Carolina Finance Corp. v. West Side Finance Co.*, 236 S.C. 109, 122-3, 113 S.E.2d 329, 336 (1960)). Dr. Corday's conservative estimates based on his investigation of Appellants' wrong-doing and the expected vs. realized earnings of his own company are certainly more than mere guesses

and are informed by his experience running the practice and in dealing with the aftermath of the scheme's unravelling. As explained in *Petty*, "[w]here the wrongful act of the defendant is of such a nature as to prevent determination of the exact amount of damages, the defendant is not allowed to insist on absolute certainty, but only that the evidence show the lost profits by reasonable inference." *Id. quoting South Carolina Finance Corp.*, 236 S.C. at 125, 113 S.E.2d at 337. Likewise here, given the nature of the scheme employed by Gregg, there is no way for Respondent to prove its lost profits with a mathematical certainly but instead it must draw reasonable inferences from Dr. Corday's experience of his own company and investigation into the scheme. Dr. Cordray's testimony, informed by his experience and investigation, is sufficient to support the trial court's award inclusion of lost revenue in its overall actual damages award, and, it is certainly sufficient to meet the "any evidence" standard.

B. The record contains sufficient evidence to support the award of punitive damages.

The trial court's order also included a modest 1:1 ratio of punitive damages in an amount equal to that of the actual damages awarded. Appellants' brief does not challenge the trial court's award of punitive damages. Neither do they challenge the trial court's methodology for arriving at the punitive award. Instead, Appellants merely state that if the Court were to reduce the actual damages award, it should also automatically reduce the punitive damages award in proportion to preserve the 1:1 ratio. Respondent assumes Appellants refer to the body of law summarized in *Solley*, 397 S.C. at 213, 723 S.E.2d at 608 which states that if the appellate court remands the case for a recalculation of special damages, it must also remand the award for punitive damages "for determination in light

of the new amount of actual damages." *Id. citing Reid v. Harbison Dev. Corp.*, 289 S.C. 319, 322, 345 S.E.2d 492, 493 (1986), *overruled on other grounds by O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993) ("Generally, actual damages should not be separated from punitive damages for a retrial on actuals alone. Punitive damages may only be awarded if actuals are recovered, and therefore, retrial only on actual damages may be improper since punitive damages may change depending on the actual damage award. In the interest of justice and fairness to all parties, both actual and punitive damages should be reconsidered together on retrial."

As discussed above, this Court should affirm the trial court's award of actual damages because there is some evidence to support the trial court's findings. Therefore, there is no need to alter the punitive damages award. However, even if the Court were inclined to reduce the award of actual damages, it is not required to reduce automatically the punitive damage award. "The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future," as well as "to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party." *Clark v. Cantrell*, 339 S.C. 369, 378-79, 529 S.E.2d 528, 533 (2000). When reviewing punitive damage awards, our appellate courts give great deference to the trial court's findings and "affirm the trial court's punitive damages finding for the Respondents if any evidence reasonably supports the judge's factual findings." *Austin v. Specialty Transp. Servs.*, 358 S.C. 298, 314, 594 S.E.2d 867, 875 (Ct. App. 2004). They also usually affirm punitive damage awards with a single-digit multiplier as comporting with due process. *Austin v. Specialty Transp. Servs.*, 358 S.C. at 318, 594 S.E.2d at 877. Here, Appellants have not

challenged the awarding of punitive damages and, even if the award of actuals were reduced as Appellants demand, the punitive award would still be less than a single digit multiplier. Therefore, even if this Court were inclined to reduce the award of actual damages, there is no need to also reduce the punitive award and the trial court should be affirmed.

CONCLUSION

For all of the foregoing reasons, the Circuit Court properly awarded damages against the defaulted Appellants and this Court should affirm the damages order in all respects.

RESPECTFULLY SUBMITTED:
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CERTIFICATE OF COMPLIANCE

I certify that that Respondent's Final brief is compliant with Rule 211 (b) of South Carolina Appellate Rules.

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