

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM BERKELEY COUNTY
COURT OF COMMON PLEAS

SC Court of Appeals

R. MARKLEY DENNIS, CIRCUIT COURT JUDGE

CASE NO. 2013-CP-08-0149

St. Stephen Family
Dentistry, LLC,

Respondent,

v.

Linda Gregg and Douglas
Allen Kaufman,

Appellants.

APPELLANTS' FINAL BRIEF

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April 1, 2015
Pawleys Island, South Carolina

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN ENTERING JUDGMENT FOR MONEY DAMAGES AGAINST APPELLANT KAUFMAN?
- II. WAS THE TRIAL COURT'S DAMAGES AWARD EXCESSIVE?

STATEMENT OF THE CASE

Appellant Linda Gregg ("Gregg") was an office manager for Herbie Orvin, a dentist in St. Stephen, South Carolina. Dr. Orvin died suddenly at the age of 51 in 2007. After his death, dentist Tristan Cordray ("Cordray") purchased Dr. Orvin's practice and renamed the business St. Stephen Family Dentistry, LLC, which is the Respondent.

Cordray retained Gregg as the office manager for the practice. In January 2011, Cordray discovered a letter from a credit card company in which the company advised Cordray that it would not accept a third-party check for payment. (ROA, Vol. I, p. 25). Cordray was unaware of any credit card account held by the practice, and also questioned why a check made payable to him was being sent to pay the credit card bill. (ROA, Vol. I, p. 25). Cordray confronted Gregg with the situation, and Gregg left that same day and never returned to the practice. (ROA, Vol. I, p. 26). Cordray ultimately hired an accountant to perform an audit and determined that approximately \$139,000 had been misappropriated by Gregg. (ROA, Vol. I, pp. 57-184; Vol. II, pp. 185-811). Cordray also reported the findings to law enforcement. (ROA, Vol. I, p. 27).¹ Cordray later had to "write off"

¹ Gregg pled guilty and was sentenced to six (6) years in prison with three

approximately \$35,000 in account receivables where patients indicated they had already paid Gregg for services rendered by the practice. (ROA, Vol. I, p. 31).

After the discovery of the fraud by Cordray, Gregg deeded her home to her boyfriend, Appellant Douglas Allen Kaufman ("Kaufman"). (ROA, Vol. I, p. 11).

Cordray then filed suit against Gregg and Kaufman. (ROA, Vol. I, pp. 9-14). The Complaint asserted two causes of action against Kaufman: one to set aside the deed from Gregg to him as a fraudulent conveyance; and one for "aiding and abetting." (ROA, Vol. I, pp. 12-13). On April 25, 2013, the trial court entered an Order of Default against Gregg and Kaufman, and, according to the Order, only twenty-two (22) days after service and before the Appellants' thirty (30) day period to answer or respond to the Complaint had run.² (ROA, Vol. I, p. 1).

The trial court held a damages hearing on October 22, 2013. Respondent presented the testimony of Cordray, accountant Richard Livingston, and Berkeley County detective Kevin Murphy. Counsel represented Appellants at the damages hearing and contested the issue of damages. The court issued an Order signed November 29, 2013, and filed

(3) years of probation.

² Gregg and Kaufman took the pleadings to an attorney, but no answer or other responsive pleading was filed on their behalf, but this issue is not the subject of any issue in this appeal.

with the Berkeley County Clerk of Court on December 4, 2013, entering judgment against Gregg and Kaufman, jointly and severally, for \$284,371.47 in actual damages, and \$285,000 in punitive damages.³ (ROA, Vol. I, pp. 2-8).

Appellants filed a timely Notice of Appeal and filed an Amended Notice of Appeal on March 27, 2014, correcting deficiencies pointed out by the Clerk.

STANDARD OF REVIEW

A trial court's decision regarding a default judgment will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988). An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997).

In reviewing a trial court's damages award, this Court does not weigh the evidence, but determines if any evidence supports it. *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 310-11, 594 S.E.2d 867, 873 (Ct. App. 2004).

³ This Order indicates Appellants were served on March 2, 2013 rather than April 2, 2013.

ARGUMENT

I. THE RECORD CONTAINS NO EVIDENTIARY SUPPORT FOR AN AWARD OF DAMAGES AGAINST KAUFMAN.

- A. Respondent has admitted there is no evidence of wrongdoing on the part of Kaufman, failed to prove any damages attributable to Kaufman, and, further, it was error to hold him jointly and severally liable for the amount of damages in default.

As an initial matter, Appellants do not challenge the trial court's decision and ruling regarding the transfer of Gregg's property to Kaufman. That deed has been set aside by the trial court and that issue is not the subject of appeal by Appellants.

The only claim in the Complaint for which Respondent sought damages against Kaufman was "aiding and abetting". (ROA, Vol. I, p. 13). Since there is no such cause of action recognized by South Carolina courts, Kaufman presumes Respondent intended a cause of action for aiding and abetting breach of fiduciary duty.

"The gravamen of the claim [for aiding and abetting breach of fiduciary duty] is the [Appellant's] knowing participation in the fiduciary's breach." *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (Ct. App. 2008) (emphasis added); *Future Group, II v. Nationsbank*, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996). Respondent did not produce any evidence that Kaufman ever worked for Respondent, had access to checks or accounts owned by Respondent, or even knew of Gregg's embezzlement of Respondent's funds.

In fact, Respondent's witnesses presented the following testimony at the damages hearing:

Q. Doctor, did you find in your review of the records any fault or claim against Douglas Kaufman for having taken monies from your practice?

A. No.

(Cordray Testimony, ROA, Vol. I, pp. 33-34).

Q. Sergeant, anything in the record to indicate conclusively on the part of Douglas Kaufman?

A. No, I don't believe so.

(Sergeant Murphy Testimony, ROA, Vol. I, p. 40):

The sole evidence implicating Kaufman in any way was the following:

Q. Did you find any benefit from any of these proceeds that were taken, any benefit that went to Defendant Kaufman?

A. What we see is, on the credit card there are travel expenses, things of that nature, all of the credit charges are what I would quantify as living expenses and travel expenses. There is airfare and hotels where Mr. Kaufman's name is referenced in it.

(Livingston Testimony, ROA, Vol. I, p. 50).

The question, however, is not whether Kaufman "benefitted" from any such monies, but whether he knowingly participated in the breach, and thereby caused Respondent's money damages. There is no such evidence and it was error to hold otherwise.

In its Order on Plaintiff's Motion for Damages, the trial court erroneously relied on a criminal law interpretation of South Carolina law in

finding Kaufman's liability. Specifically, the trial court cites *Johnson v. Collins Entm't Co., Inc.*, in which the South Carolina Supreme Court interpreted a state criminal statute finding equal *guilt* for wrongdoers who aided, abetted, and encouraged principals in the commission of their crimes. *Johnson v. Collins Entm't Co., Inc.*, 349 S.C. 613, 630, 564 S.E.2d 653, 662 (2002) (emphasis added).

In the civil context, however, "[j]oint and several liability arises only when two or more tortfeasors are responsible for a single injury." *Collins v. Bisson Moving & Storage, Inc.* 332 S.C. 290, 306, 504 S.E.2d 347, 356 (Ct. App. 1998). There are simply no facts or evidence presented by Respondent, stated in the record, or in the trial court's order, which would give rise to personal liability on the part of Kaufman for money damages.

Second, "[a] defendant in default admits liability but not the damages...." *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 203, 723 S.E.2d 597, 603 (Ct. App. 2012) (citing *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981)). "[T]he defaulting defendant has conceded liability. However, a defaulting defendant does not concede the [a]mount of liability." *Solley*, 397 S.C. at 203, 723 S.E.2d at 603 (quoting *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978)). Even "[i]n a default case, [therefore,] the plaintiff must prove ... the amount of his damages, and such proof must be by a preponderance of the evidence." *Solley*, 397 S.C. at 204, 723 S.E.2d at 603 (citation

omitted).

In *Solley*, the South Carolina Supreme Court relied on *Renney* and *Howard* for the principle that a plaintiff must prove his damages even when the defendant has defaulted as to liability. *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 90, 757 S.E.2d 557, 558 (Ct. App. 2014). In *Solley*, the Court reversed part of an award of special damages, not because the trial court awarded the amount demanded in the prayer, but because the plaintiff failed to prove the amount of the alleged loss. *Solley*, 397 S.C. at 210. Therefore, this Court has stated that *Solley* demonstrates “the principle that a plaintiff must prove his damages even when the defendant is in default applies to all damages claims in default cases.” *Wells Fargo Bank*, 408 S.C. at 90.

The trial court, in its Order on Plaintiff’s Motion for Damages, stated that “Defendants’ misconduct resulted in significant monetary damages to Plaintiff.... Further, *both* Defendants demonstrated indifference and reckless disregard of Plaintiff’s property rights.” (Order, p. 6) (emphasis added). Furthermore, the Plaintiff was entitled to punitive damages as punishment for “*Defendants’* reckless, willful, wanton and malicious conduct.” (ROA, Vol. I, p. 6) (emphasis added).

As the trial court noted, Kaufman only *benefitted* from Gregg’s alleged misconduct. There is no evidence, and the trial court referenced none, that Kaufman was an active co-participant in Gregg’s scheme.

Respondent's witnesses' testimony does not support this finding, either. Further, Respondent's complaint does not put forth any facts relating to any claims against Kaufman in furtherance of Gregg's scheme. "Benefitting" is a far cry from "knowing participation", as required under South Carolina law.

Finally, the Supreme Court of South Carolina has recognized courts should consider "other equitable considerations" in analyzing the award of a default judgment. *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 12, 753 S.E.2d 537, 543 (2014). Simply put, it would be inequitable to hold Kaufman jointly and severally liable for a wholly unsupported claim where there are no facts whatsoever to support the notion that he had any participation in the scheme that injured Respondent.

Therefore, the trial court's Order awarding judgment to Respondent for money damages against Kaufman, jointly and severally with Gregg, should be reversed and/or vacated.

II. THE DAMAGES AWARD WAS EXCESSIVE.

A. \$107,500.00 of the damages award was, by Respondent's own admission, purely speculative. Therefore, the actual damages award was excessive and, based upon the trial court's stated 1:1 ratio, the punitive damages award was excessive.

Gregg does not dispute or appeal that portion of the trial court's damages award for the embezzled funds and the costs of investigation. (ROA, Vol. I, p. 5). The remaining two elements of damages, however, are without evidentiary support, unsupported by the record, and purely speculative.

Damages may not be left to mere speculation or conjecture. *Vortex*, 662 S.E.2d at 450-51; *Petty v. Weyerhaeuser Co.*, 288 S.C. 349, 355, 342 S.E.2d 611, 615 (Ct. App. 1986). Where lost profits are concerned, the law does not require absolute certainty but only reasonable certainty that the damages are not purely speculative and there exists a fairly accurate method of estimate the lost profits. *Id.*

The trial court awarded Respondent \$35,000 for accounts receivables written off, and \$72,500 for lost revenue.

B. Written-off Accounts Receivables.

As for the accounts receivables, Cordray testified as follows:

A. We kind of had to wipe the accounts receivable clean for anything that was done while she was there. It's kind of hard to ask a patient to pay for a service and they say "oh, well, I paid fifty bucks to her." And, you know, I really had no ground to stand on.

Q. So do you know how much your accounts receivables were that you kind of had to wipe off?

A. Yes, ma'am. It was right at \$35,000. I had a special adjustment just for that section.

.....

Q. I guess I want to separate then what we're speculating at versus what you intend to testify to with some certainty.

A. Okay.

.....

Q. Okay. And some of the things you can't prove would be in a patient came in paid her fifty dollars cash, and there's no record of that?

A. That's correct.

Q. And at this point, you would have waived collection on that kind of account receivable because you don't want to push the patient away any further?

A. That's correct.

(Cordray Testimony, ROA, Vol. I, pp. 31, 34, 35).

Respondent presented no evidence from Livingston, his own accountant, or the practice's accountant establishing this \$35,000 figure which Gregg may have allegedly been paid directly by patients and pocketed to his detriment. This figure is a purely speculative approximation without any evidentiary support and should not have been included in the damages award.

C. Lost Revenues.

The "lost revenues" testimony was even more suspect:

Q. So did you lose patients?

A. We did. I'd estimate maybe about fifty.

Q. Can you estimate the financial impact?

A. The first six months, it was probably about fifty thousand in production, so probably ten to fifteen per year.

(Cordray Testimony, ROA, Vol. I, pp. 30-31).

Again, there is absolutely no documentary evidence, no analysis of before vs. after revenues, no testimony from the accountant Livingston, and no tax returns to support the purported "lost revenues" damages. All of Cordray's testimony on these two elements of damage is replete with the

words "kind of", "probably", "estimate", and "about". Cordray admitted as much:

- Q. Okay, if we're here to talk about damages that we're able to prove today, we're talking about a hundred thirty-nine thousand dollars or is there another number?
- A. That's the number I can prove, that I have hard evidence in my hand of.

(Cordray Testimony, ROA, Vol. I, pp. 34-35).

Any damages beyond that number, and the costs of investigation, are purely speculative, conjecture, and without evidentiary support and the trial court should not have included them in its order awarding damages.

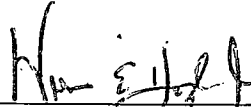
The trial court then held in its Order that it believed a 1:1 ratio of punitive damages to actual damages was reasonable. (ROA, Vol. I, p. 7). If the actual damages award is reduced, which South Carolina law requires, then the punitive damages award must be reduced as well to maintain the 1:1 "reasonable" ratio of punitive damages to actual damages.

CONCLUSION

Based upon the foregoing, Appellant Kaufman respectfully requests the trial court's ruling granting Respondent's Motion for Damages against him be reversed and/or vacated, and Appellants, assuming Kaufman's initial request is denied, request the trial court's ruling regarding the amount of damages awarded to Respondent be vacated and/or reversed, and remanded for entry of an order in accord with the evidence presented at the damages hearing, both as to actual damages and punitive damages.

Additionally, Appellants would ask that the judgment be reversed and/or vacated for any other reason appearing in the record of the case.

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The Honorable R. Markley Dennis

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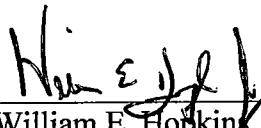
v.

Linda Gregg and Douglas Allen Kaufman.....Appellants

CERTIFICATE OF COUNSEL

The undersigned, as counsel for Appellants, certifies that this Final Brief complies with Rule 211(b), SCACR.

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