

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
In the Court of Common Pleas for the First Circuit

Walter H. Sanders, Jr., Special Referee

Case No. 2018-CP-18-01194

RECEIVED
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SC Court of Appeals

Marjorie Faye Rickenbaker & Steve L. Rickenbaker Respondents

v.

Schumacher Homes of South Carolina, Inc. Appellant

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the lower court properly refer the matter to a Special Referee even though no cause was shown, no motion was filed, and a Master in Equity was available?
- II. Did the special referee err by awarding damages without a reasonable evidentiary basis?

STATEMENT OF THE CASE

This matter came before the court on July 3, 2018, when Plaintiffs/Respondents Marjorie Faye Rickenbaker and Steve L. Rickenbaker (hereinafter “Respondents” or “the Rickenbakers”) filed an Amended Complaint in Dorchester County, alleging that Defendant/Appellant Schumacher Homes of South Carolina, Inc. (hereinafter “Appellant” or “Schumacher Homes”) had breached its contract and implied warranties when it constructed their residence because the home was replete with mold and consequently uninhabitable. The Rickenbakers demanded a jury trial and requested judgment for damages in an amount not to exceed Seventy-Five Thousand Dollars (\$75,000.00). Schumacher Homes defaulted, and the court referred the matter to a Special Referee by Order dated October 23, 2018. On November 13, 2018, at 4:21pm, the Rickenbakers sought to withdraw their jury demand. Thirty minutes later, at 4:51pm, Schumacher Homes moved to withdraw the reference to the Special Referee and demanded a jury trial on the issue of damages. The following morning, the Special Referee heard and denied Appellant’s motions and, after testimony from the Rickenbakers, awarded damages in the amount of Seventy-One Thousand, Two Hundred Forty-Nine Dollars and 99/100 (\$71,249.99). This appeal followed, with Notice of Appeal timely served on the Rickenbakers on April 4, 2019.

FACTS

In the fall of 2014, The Rickenbakers contracted with Schumacher Homes for the construction of a single-family residence for their daughter to live in on their property at 328 Gelzer Lane, Summerville, South Carolina. See Am. Compl. at ¶ 6; Hr’g Tr. 14:2–14:17, Nov. 14, 2018. The home was completed in or around April of 2015. *Id.* at 14:23–14:25. Around two and a half years later, around November of 2017, the Rickenbakers came to believe that the home had been contaminated by mold and bacteria. *Id.* at 15:4–15:15. They further came to believe that the home was no longer habitable, and undertook a series of repairs and replacements designed to correct the perceived mold issue. *See id.*; J. at 4, March 6, 2019. In total, the Rickenbakers reportedly incurred the following costs, repairs, and other expenses allegedly resulting from the purported mold problem:

- HVAC Repair - \$3,500
Mrs. Rickenbaker testified that portions of the air conditioning in the attic had to be replaced due to “rust, mold, fungus.” J. at 4; Hr’g Tr. 16:17–17:5; 17: 21–17:25. Mrs. Rickenbaker further testified that some costs were related to cleaning the air conditioner, replacing rusted drain pans, and installing a UV light to “kill any bacteria growth.” Hr’g Tr. 20:10 –20:20.
- Replace Moisture Barrier - \$9,400
Mrs. Rickenbaker testified that the moisture barrier underneath the home was replaced because it was “thin” and did not cover the entire footprint of the home. J. at 4; Hr’g Tr. At 46:19–47:21.
- Replace Flooring - \$22,000 (*estimate*)
The Rickenbakers claimed an estimated \$22,000 for replacement of the flooring, purportedly because “there’s just stuff” coming through the existing flooring. The estimate was not provided. J. at 4; Hr’g. Tr. 21:12–21:21; 42:15–42:23.
- Furniture Cleaning - \$1,000
Mrs. Rickenbaker testified that she paid \$1,000 to have certain furniture “wipe[d] down and disinfect[ed].” J. at 4; Hr’g Tr. At 21:22–22:8.
- Wiping/Cleaning House - \$1,500 (*estimate*)

Mrs. Rickenbaker testified that she had received an estimate to wipe down the interior of the home, including cabinets and sheetrock. The Rickenbakers did not provide documentation of the estimate or identify its source. J. at 4; Hr'g Tr. At 22:12–22:15; 47:22–48:9.

- Clean/Repair Drains - \$2,200 (*estimate*)
Mrs. Rickenbaker testified that the household drains would need to be cleaned and disinfected because “some type of things come up,” and that her daughter refused to set foot in the bathtub because she perceives “bacteria or something in the drains.” She further testified that the estimate was obtained from a plumber, but did not identify the plumber or provide the estimate. J. at 4; Hr'g Tr. 22:16–22:24; 48:10–49:18.
- Washer/Dryer - \$1,000
Mrs. Rickenbaker testified that her washer unit needed to be replaced due to “just the use of the water and such,” and that she believed the dryer needed to be replaced because “what comes through the lint” had mold in it. J. at 4; Hr'g Tr. 22:25–23:11.
- Furniture Replacement - \$5,000
Mrs. Rickenbaker testified that she replaced upholstered furniture in the home because she perceived it to be contaminated with mold. J. at 4; Hr'g Tr. 23:13–24:10.
- C & C Myers Inspection - \$259.99
Mrs. Rickenbaker testified that she had paid for an inspection of the home. J. at 4; Hr'g Tr. 24:11–24:16.
- Car Clean - \$250
The Rickenbakers assert that they paid \$250 to have their daughter’s car cleaned by BioSweep, alleging that their daughter transferred mold from the home into the car and was no longer able to drive it as a result. J. at 4; Hr'g Tr. 44:5–44:17.
- Rent (1 year, 2 months) = \$14,000
Mrs. Rickenbaker testified that the home had been uninhabitable for 14 months, and that her mortgage payments was approximately \$1,000 each month. J. at 4; Hr'g Tr. 25:3–25:10.
- Clean/Repair Sub-Floor and Joist - \$10,000 (*estimate*)
The Rickenbakers are seeking additional estimated costs to correct unidentified damage to the sub-floor and joists; Mrs. Rickenbaker testified that it was “possible” they would need to do some replacement, and the figure offered was “an estimate [they] had received.” Plaintiffs did not identify the source of the estimate or provide a copy. J. at 4; Hr'g Tr. 44:20–45:13.
- Alpine Air Inspection - \$140

Mrs. Rickenbaker testified that in addition to C & C Myers, she and her husband had hired a second company to inspect the home. J. at 4; Hr'g Tr. 26:8–26:14.

- Move Items - \$1,000 (*estimate*)
The Rickenbakers speculate that in the event that certain work to the home were to be completed, they would need to hire an outside party to remove furniture from the home. They have not received an estimate. J. at 4; Hr'g Tr. 26:15–26:19.

Schumacher Homes defaulted on the Amended Complaint, and the Court referred the matter to Judge Walter H. Sanders, Jr., an Allendale County attorney and municipal judge, as Special Referee. Schumacher Homes objected to the referral on grounds that the referral was improper, as Dorchester County, where the matter was initiated, had a competent master-in-equity appointed and that the issue of damages should've been determined by a jury. The special referee rejected these arguments and proceeded with the damages hearing.

The Rickenbakers testified to a total of Seventy-One Thousand, Two Hundred Forty-Nine and 99/100 Dollars (\$71,249.99) in potential costs and expenses allegedly connected to the purported mold problems. Hr'g Tr. 27:1–27:2. Plaintiffs' summary of their claimed damages was admitted over objection without any supporting documentation or any testimony from any expert or services provider. The Special Referee concluded that all of the above damages were causally related to the alleged mold problem and awarded the Rickenbakers the entire amount. *See* J. This appeal followed.

ARGUMENTS

Although in default, Schumacher Homes has not conceded the amount of its liability, and the Rickenbakers are still required to prove the amount of their damages by a preponderance of the evidence. *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 757 S.E.2d 557, 558 (Ct. App. 2014). As of the day before the hearing, both the Rickenbakers and Schumacher Homes had demanded that this disputed issue be resolved by a jury; nevertheless, the circuit court referred the matter to a Special Referee, without cause and despite the availability of a master-in-equity, effectively depriving the Appellant of its right to have this contested dispute resolved by jury.

Appellant now requests that this Court vacate the judgment entered by the Special Referee for lack of subject matter jurisdiction and remand, on the grounds that (I) the appointment of a Special Referee was improper under S.C. Code Ann. § 14-11-60 because a master-in-equity was available and no cause was shown for the appointment; and (II) the Special Referee erred in finding that the Plaintiffs had established the amount and causation of their purported damages by a preponderance of the evidence.

I. The special referee lacked jurisdiction over the proceedings because the Order of Referral failed to articulate any cause

The South Carolina Rules of Civil Procedure and S.C. Code Ann. § 14-11-60 provide for the appointment of a Special Referee in three circumstances: where the office of master-in-equity is vacant; where the master-in-equity is disqualified or disabled from hearing the matter; or “any other reason for which cause can be shown.” S.C. Code Ann. § 14-11-60. None of these circumstances were present when the circuit court referred this

matter to Judge Walter H. Sanders, Jr., in Allendale County, as Special Referee.¹ Because the circuit court's order fails articulate any reason for the referral, the special referee lacked authority and subject matter jurisdiction over the damages hearing, and the resulting judgment must be vacated.

The issue presents a question of statutory interpretation, which is a question of law for this Court to review *de novo*, with no deference given to the lower court's opinion. See *Barton v. S.C. Dep't of Prob. Parole & Pardon Servs.*, 404 S.C. 395, 414, 745 S.E.2d 110, 120 (2013); *Lollis v. Dutton*, 421 S.C. 467, 477, 807 S.E.2d 723, 728 (Ct. App. 2017). It is a cardinal rule of statutory construction that the Court's purpose is to effect the legislature's intent, and that the best evidence of that intent is the plain language of the statute. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Where the language is clear and unambiguous, the court is bound to give effect to the statute as written and has "no right to impose another meaning." *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535–36, 725 S.E.2d 693, 695 (2012). Congress is presumed to be aware of the common law, and where a statute uses a term with an ordinary, well-recognized meaning in the law, that term must be applied according to its common use. *Id.* at 536, 725 S.E.2d at 696. The interpreting court is also bound by the presumption that the legislature did not intend for its statutes to be futile or without effect, and must construe the statute such that "no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *Matter of Decker*,

¹ Further, at the time of the referral order, the issue of damages was subject to a trial by jury. Pursuant to Rule 53(b), any issue subject to a jury demand and referred to a special referee must be remanded to the circuit court. Although the Rickenbakers had demanded a jury trial, the Special Referee did not promptly remand.

322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995); *see also State v. Sweat*, 379 S.C. 367, 375–77, 665 S.E.2d 645, 650–51 (Ct. App. 2008).

Dorchester County has a sitting Master-in-Equity, and there is no indication that Judge Chellis was disqualified or otherwise disabled from hearing this matter. Therefore, the referral order, if valid, must be premised on “any other reason for which cause can be shown.” *See* S.C. Code Ann. § 14-11-60. South Carolina courts are regularly asked to apply a “for cause” standard in a number of contexts, all of which require at least *some* showing of reasoning or rationale. *See, e.g.*, Rule 6(b), SCRCP (extending time for response or notice); Rule 77(c), SCRCP (suspension and rescission of clerk action); *Church v. McGee*, 391 S.C. 334, 705 S.E.2d 481 (Ct. App. 2011) (removal of personal representative); *Hodges*, 341 S.C. at 89, 533 S.E.2d at 583 (removal of board members); *Willms Trucking Co., Inc. v. JW Const. Co. Inc.*, 314 S.C. 170, 442 S.E.2d 197 (Ct. App. 1994) (termination of contract); *Mickens v. Southland Exchange-Joint Venture*, 305 S.C. 127, 406 S.E.2d 363 (1991) (termination of employees); *State v. Green*, 301 S.C. 347, 392 S.E.2d 157 (1990) (exclusion of jurors); *Jacoby v. S.C. State Bd. of Naturopathic Examiners*, 219 S.C. 66, 64 S.E.2d 138 (1951) (revocation of license); *York Supply Co. v. Southern Ry. Co.*, 82 S.C. 350, 64 S.E. 387 (1909) (grant of continuance). Regardless of the application, South Carolina has uniformly held that a “cause shown” standard is not merely a recitation, and at least some degree of proof is required. The court cannot disregard this language or refuse to give it effect. The Special Referee statute clearly contemplates referral only under circumstances where a master-in-equity is unavailable and there is some articulated reason to refer the matter from the circuit judge.

The reference Order falls short of even the most minimal standard. The Order of Reference to Special Referee fails to offer even a perfunctory “reason for which cause can be shown.” Order of Reference to Special Referee, Oct. 23, 2018. With an available master-in-equity presiding in Dorchester County, the circuit court was required by the plain language of the originating statute to put forward some reason or establish some cause for referral to a special referee. Instead, the Order merely makes cursory reference to a motion by Plaintiffs and confers power and authority to the Special Referee. Even the most liberal, relaxed reading of the Special Referee statute requires something more. As such, the Special Referee lacked authority and subject matter jurisdiction over the damages hearing, and the Judgment must be vacated.

II. The evidence does not support the special referee’s damages award

Even if the Special Referee had jurisdiction and authority to determine damages without a jury, he nevertheless erred by awarding the Rickenbakers the entire amount requested because the proof offered did not establish by a preponderance of the evidence that all of the costs requested were necessary and causally related to the purported mold problem. Schumacher is deemed to have admitted the allegations of the Amended Complaint. “Whether a defendant is or is not in default, it is incumbent upon the judge and/or the jury to make a judicial determination of the amount recoverable based on the proof.” *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 567, 274 S.E.2d 290, 293 (1981). “The amount of damages must be proved by a preponderance of the evidence.” *Id.* at 566, 274 S.E.2d at 292. Our courts have recognized that damages hearings can result in inflated awards based on the Plaintiff’s prayer for relief, and therefore require the plaintiff to establish damages through competent evidence, while the defendant is limited to contesting

those damages by cross-examination and objecting to evidence. *See Marion Amphitheatre, LLC*, 408 S.C. at 90, 757 S.E.2d at 558–59; *Jackson v. Midlands Human Res. Ctr.*, 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct. App. 1988) (“A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered.”). An award of actual or compensatory damages may be reversed for error of law when there is no evidence “reasonably supporting” them. *Mellen v. Lane*, 377 S.C. 261, 275, 659 S.E.2d 236, 244 (Ct. App. 2008).

In *Solley v. Navy Federal Credit Union, Inc.*, this Court reversed a portion of an award of special damages because the plaintiff failed to prove the amount of her loss. *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 203–04, 723 S.E.2d 597, 603 (Ct. App. 2012). In *Solley*, the plaintiff asserted a claim for slander of title after a co-owner of her house obtained a mortgage on the property without her knowledge. *Id.* at 198, 723 S.E.2d at 600. After the bank defaulted, the matter was referred to a special referee. *Id.* at 200, 723 S.E.2d at 601. At the damages hearing, the plaintiff testified that her uncertainty about the mortgage had caused her anxiety, preventing her from having guests and culminating in her losing her job, family, and grandchildren. *Id.* The special referee found that the bank had filed a false statement and acted with malice, and that the plaintiff had been damaged by the impediment to her ability to borrow against her interest in the home. *Id.* at 201, 723 S.E.2d at 601. The referee determined that the plaintiff was entitled to special damages, including damages to satisfy the mortgage on the property and an additional award of punitive damages. *Id.* After both parties appealed, the bank argued that the special damages award was excessive and the plaintiff had failed to prove them. *Id.* at 203, 723 S.E.2d at 602. This Court agreed, finding that the plaintiff had not put forward any evidence tending

to establish she had actually suffered a loss arising out of the improperly recorded mortgage, vacated that portion of the judgment, and remanded for a determination of the plaintiff's attorney's fees. *Id.*

Solley represents the principle that a plaintiff's failure to establish damages by a preponderance of the evidence must result in reversal of the judgment. Courts recognize that the defaulting defendant's limitation to cross-examination and objections requires the imposition and enforcement of additional due process safeguards designed to prevent excessive or unsupported awards, including the requirement that the plaintiff put forward proof to warrant the award. *Limehouse v. Hulsey*, 404 S.C. 93, 116, 744 S.E.2d 566, 579 (2013). The damages awarded must comport with the evidence presented at the hearing and the allegations of the complaint.

Here, the Rickenbakers have failed to prove their damages by a preponderance of the evidence, and in particular failed to put forward evidence that all of their purported damages were causally related to the alleged mold problem. They also failed to provide supporting documentation to establish even a minimal standard of evidence in support of their claimed estimates.

- Replace Flooring - \$22,000 (*estimate*): The Rickenbakers claim to have obtained a \$22,000 "estimate" to replace their flooring due to unspecified contamination. The testimony and evidence offered fails to create a basis for this element of damage or show a causal connection relating to the allegations of their Amended Complaint.
- Wiping/Cleaning House - \$1,500 (*estimate*): The Rickenbakers also testified that they had obtained an estimate to have the interior of the house "wiped

down.” Again, they have failed to produce any documentation to support this estimate or even identified its source or permit the court to evaluate whether the amount is reasonable for the scope of work.

- Clean/Repair Drains - \$2,200 (*estimate*): As with the other estimates testified to by the Rickenbakers, their claim for expenses arising from the cleaning of certain drains in the home is not supported by written documents, nor have they identified its source or provided any evidence as to how any problem with the drain is associated with the mold allegations raised in their Amended Complaint.
- Washer/Dryer - \$1,000: The Rickenbakers claim that the purported mold problem necessitated replacement of their washer and dryer units. However, they have failed to put forward evidence sufficient to establish by a preponderance of the evidence that the mold issues alleged in the Amended Complaint caused any issues with the Plaintiffs’ washing machine and dryer that would necessitate a complete replacement of both units.
- Car Clean - \$250: Mrs. Rickenbaker testified that her daughter had concluded that she had somehow transported mold from the home and into the vehicle, necessitating a cleaning fee that, reportedly, still has not resolved the issues. Again, this testimony does not establish by a preponderance of the evidence that any kind of causal relationship existed between the household mold concerns alleged in the Amended Complaint and the Rickenbaker’s vehicle.
- Rent (1 year, 2 months) - \$14,000: The Rickenbakers are seeking Fourteen Thousand Dollars and no/100 (\$14,000.00) to account for rent they paid on

behalf of their daughter while the home was allegedly uninhabitable. However, this calculation is premised on the Rickenbaker's mortgage payment—an expense and amount they would have been obligated to pay regardless of any reported issues with the home. Instead, this calculation should have been premised on the monthly rent actually paid.

- Clean/Repair Sub-Floor and Joist - \$10,000 (*estimate*): The Rickenbakers are seeking Ten Thousand Dollars and no/100 (\$10,000.00) for cleaning and repairs that, by Mrs. Rickenbaker's own testimony, may or may not need to occur. Moreover, they have again failed to produce a copy of the estimate or identify the person or entity who reportedly prepared it.
- Move Items - \$1,000 (*estimate*) – The Rickenbakers testified that, in the event they proceed with the repairs above, they would be required to hire a third party to remove furniture from the home. Mrs. Rickenbaker testified that she believed this expense would be One Thousand Dollars and no/100 (\$1,000.00), but did not produce a written estimate or sufficient evidence to allow the special referee to evaluate the reasonableness of the amount.

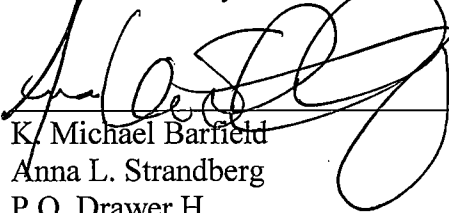
As a defaulting defendant, Schumacher Homes has admittedly conceded liability. However, the Rickenbakers were still required to put forward evidence adequate to establish their claimed damages and the relationship of those damages to the allegations of the Amended Complaint by a preponderance of the evidence. This Court has recognized that this requirement must be enforced in order to prevent unreasonable or excessive awards where defendants are unable to put up countervailing evidence or testimony, and judgments that are not supported by ample evidence should be vacated. Here, the

Rickenbakers have claimed several repairs that are inadequately supported or documented, or bear no apparent relationship to their allegations against Schumacher Homes. As to the specific damage items above, the evidence of record does not reasonably support the special referee's findings, and this Court should vacate that portion of the judgment.

CONCLUSION

Although in default, Appellant Schumacher Homes is still entitled to a full and fair damages hearing in accordance with applicable law and the South Carolina Rules of Civil Procedure. The circuit judge erred by improperly referring the matter to the special referee without cause, and the special referee erred by failing to remand the matter to the circuit judge for a jury trial and awarding damages absent sufficient evidence in the record to reasonably support his findings. For these and the foregoing reasons, Appellant Schumacher Homes of South Carolina, Inc. respectfully requests that this Court vacate the judgment below and remand for a jury trial on the issue of damages.

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May 3, 2019
Charleston, South Carolina

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Walter H. Sanders, Jr., Special Referee

Case No. 2018-CP-18-01194

Marjorie Faye Rickenbaker
and Steve L. Rickenbaker,

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v.

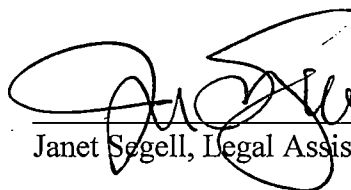
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I certify that I have served Appellant's Initial Brief on William F. Barnes, III and John E. Parker, P.O. Box 457, Hampton, SC 29924-0457 by depositing a copy of it in the United States Mail, postage prepaid, on May 3, 2019.



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SC Court of Appeals

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The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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Columbia, SC 29211

RE: *Marjorie Faye Rickenbaker v. Schumacher Homes*
Appellate Case No. 2019-000598

Dear Madam Clerk:

Please find enclosed Appellant Schumacher Homes Initial Brief and Designation of Matter. We would greatly appreciate your returning date-stamped copies of these filings in the enclosed, self-addressed envelope.

As demonstrated by the enclosed Proofs of Service, I am serving copies of same on counsel for Respondents.

With regards,

Janet Segell, Legal Assistant to
K. Michael Barfield and Anna L. Strandberg

/jas
enclosures

c: William F. Barnes, III, Esq.
John E. Parker, Esq.

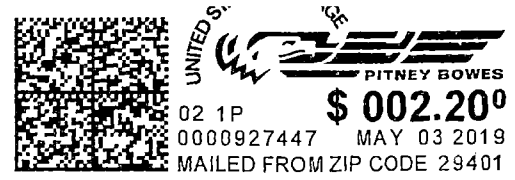
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REPRESENTING CLIENTS IN ALL COURTS IN SOUTH CAROLINA AND NORTH CAROLINA AND IN THE UNITED STATES PATENT AND TRADEMARK OFFICE



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