

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Walter H. Sanders, Jr., Special Referee

Appellate Case No.: 2019-000598

Marjorie Fay Rickenbaker and Steve L. Rickenbaker Respondents,

v.

Schumacher Homes of South Carolina, Inc. Appellant,

RESPONDENTS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. Can a party in default directly appeal a default judgment without first filing a Rule 60(b), SCRCF motion?**

- II. Did the lower court properly refer the matter to a Special Referee as authorized by Rule 53, SCRCF?**

- III. Should the substance of Schumacher's cross-examination and objections have prevented the Special Referee from drawing a reasonable conclusion that the damages evidence offered by the Respondents was accurate?**

STATEMENT OF THE CASE

The Respondents, Marjorie and Steve Rickenbaker, originally filed this action in the Dorchester County Court of Common Pleas on July 2, 2018, and amended their complaint on July 3, 2018. In their complaint, the Rickenbakers alleged that the Appellant, Schumacher Homes of South Carolina, Inc. (“Schumacher”), breached a Purchase/Construction agreement and the implied warranty of habitation accompanying the sale and construction of a home. (Am. Compl. ¶¶ 7, 11). The Rickenbakers’ new home was infested with mold and uninhabitable as a result of the aforementioned breaches. (Am. Compl. ¶ 8). The Rickenbakers also alleged that they suffered damages for the cost of repairs, loss of use, and diminution of the value of the home. (Am. Compl. ¶¶ 8, 12). The Amended Complaint included a demand for a jury trial and requested judgment for damages in an amount not to exceed \$75,000.

Schumacher never answered, and the court entered an order of default on October 9, 2018. (Entry and Order of Default). On October 23, 2018, the court appointed Judge Walter H. Sanders, Jr. as Special Referee over the action for all purposes pursuant to Rule 53, SCRCF. (Order of Reference to Special Referee). On November 13, 2018, the Rickenbakers withdrew their jury demand pursuant to Rule 38(d). (Pls.’ Withdrawal of Jury Trial Demand). Despite its default status, later that same day Schumacher made a jury demand and moved the court to withdraw the order of reference. (Def.’s Mot. to Withdraw Reference). On November 14, 2018, the Special Referee conducted a damages hearing that was attended by the Rickenbakers and counsel for Schumacher. (*See generally*, Hr’g Tr.). The Special Referee denied Schumacher’s motion and demand for a jury trial, then heard testimony on the issue of the amount of damages. (*Id.*).

The Rickenbakers, and Mrs. Rickenbaker in particular, introduced evidence in the form of testimony establishing the cost of prior work on the home and estimates of future repairs and cleaning that would need to be performed on the home. Counsel for Schumacher spent the majority of his cross-examination disputing the issue of causation and attempting to introduce evidence contesting Schumacher's liability, instead of contesting the amount of damages. The Special Referee awarded damages in the amount of \$71,249.99 to the Rickenbakers and the judgment was entered against Schumacher on March 6, 2019. This appeal followed on April 4, 2019.

FACTS

In August of 2013, Marjorie and Steve Rickenbaker contracted with Schumacher to construct a residence at the property where Mrs. Rickenbaker was born and raised, located at 328 Gelzer Lane, Summerville, South Carolina. (J. ¶ 1; Am. Compl. ¶ 6; Hr'g Tr. 13:23-14:2, 29:23-24). The Rickenbakers paid \$242,000 for the home, which was intended to serve as a residence for their daughter, Jennifer Rickenbaker. (*Id.* at 14:7-17). Jennifer moved into the home at the end of April 2015. (*Id.* at 14:24-25). By the fall of 2017, the home had become infested with mold to such an extent that Jennifer had to move out of it. (*Id.* at 15:9-15). Mold was present underneath the home and in the attic, air vents, and living spaces of the home itself. (*Id.* at 15:16-18:14).

As a result of the mold infestation, the Rickenbakers have had to engage in extensive repair and cleaning work on the home. The Rickenbakers have had to clean and replace parts of the air conditioner and duct work. (*Id.* at 20:7-20). The moisture barrier underneath the home had to be removed and replaced. (*Id.* at 20:23-24). The flooring had to be replaced and antique furniture had to be professionally cleaned. (*Id.* at 21:12-22:11). The entire home had to be

cleaned and disinfected. (*Id.* at 22:12-17). Drains had to be cleaned and repaired due to extensive mold growth within them. (*Id.* at 22:16-23). The washer and dryer and select items of furniture had to be replaced, and inspections were performed on the premises to determine the cost of cleanup. (*Id.* at 23:9-24:16). Jennifer's car had to be cleaned, as mold spores transferred from her home propagated within the upholstery, and the Rickenbakers lost rent they would have collected from their daughter in the amount of \$1,000.00 per month. (*Id.* at 24:17-25:13).

For the sub-floor and joists, the Rickenbakers have two options: they must be either cleaned or repaired. The Rickenbakers provided an estimate for cleaning of the sub-floor and joists, as it is the lower of the two estimates. (*Id.* at 25:17-26:7). Other costs for an inspection and the cost of moving furniture within the house were described in Mrs. Rickenbaker's testimony. (*Id.* at 26:8-25). Ms. Rickenbaker testified to the amount paid for each repair, or the estimates they had been provided for repairs and cleaning that would need to be performed. The total amount of damages was \$71,249. (*Id.* at 27:1). The Special Referee determined that Mrs. Rickenbaker's testimony was credible and established the damages, issuing a ruling in favor of the Rickenbakers. (*Id.* at 59:3-6; J. ¶¶ 11, 14).

ARGUMENT

A default judgment cannot be directly appealed to this Court without first filing a Rule 60(b) motion, which Schumacher did not do. Furthermore, the circuit court's order referring this matter to Special Referee, Walter H. Sanders, Jr., was appropriate under S.C. Code § 15-31-150 and Rule 53, SCRPC, and Schumacher has not demonstrated that the evidence offered by the Rickenbakers did not reasonably support the Special Referee's damages award. As Schumacher is in default and was limited to contesting the damages by cross-examination and objection, it

has not offered any evidence refuting the proof of costs offered by the Rickenbakers. Therefore, the Court should affirm the judgment entered by the Special Referee or dismiss the appeal.

I. A Default Judgment Cannot be Directly Appealed.

The Supreme Court of South Carolina has held that a default judgment cannot be directly appealed. In *Winesett v. Winesett*, 287 S.C. 332, 333, 338 S.E.2d 340, 341 (1985), the court dismissed an appeal from a default judgment as improper, noting that its decision was “in accord with other South Carolina cases holding that a direct appeal does not lie from a default judgment.” While the *Winesett* decision was an appeal from Family Court, prior Supreme Court decisions have also rejected appeals from the circuit courts on the same ground that a default judgment is not appealable. *Gadsden v. Home Fertilizer & Chemical Co.*, 89 S.C. 483, 72 S.E. 15 (1911) (“Ordinarily no appeal lies from a judgment by default.”); *Odom v. Burch*, 52 S.C. 305, 29 S.E. 726 (1898) (“Unless provided for expressly by statute, no appeal will lie from a judgment by default.”). The reason for this is that once a defendant fails to appear and answer, “he has no status in court which will enable him to appeal from the judgment rendered.” *Washington v. Hesse*, 56 S.C. 28, 33 S.E. 787 (1899).

Winesett mandates that the proper procedure for challenging a default judgment is through a Rule 60(b) motion to set aside the judgment. *Winesett*, 287 S.C. at 334, 338 S.E.2d at 341; *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009) (“Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCF.”). Once the motion has been denied, an appeal may then be taken. *Winesett*, 287 S.C. at 334, 338 S.E.2d at 341. Schumacher filed a direct appeal following the entry of default judgment and has never moved to have the judgment vacated under Rule 60.

Accordingly, Schumacher's appeal should be dismissed and the merits should not be reached on this ground alone.

II. The Proceedings were Properly Referred to a Special Referee.

Even if the Court should decide not to dismiss the appeal, the Court should affirm the Special Referee's judgment because he had jurisdiction over the proceedings. Schumacher contends that the Special Referee lacked jurisdiction over the proceedings because the circuit court did not abide by the requirements of S.C. Code Ann. § 14-11-60 when it appointed Judge Sanders as Special Referee. However, S.C. Code Ann. § 15-31-150 provides that section 14-11-60 does not preclude a circuit court from appointing a special referee, and Rule 53(b) explicitly states that a special referee may be appointed by order of a circuit judge in default cases.

Section 14-11-60 states that

In case of a vacancy in the office of master-in-equity or in case of the disqualification or disability of the master-in-equity from interest or any other reason for which cause can be shown the presiding circuit court judge, *upon agreement of the parties*, may appoint a special referee in any case who as to the case has all the powers of a master-in-equity.

S.C. Code Ann. § 14-11-60 (1977) (emphasis added). Notably, the statute articulates a *general rule* that upon the agreement of the parties, a circuit court may appoint a special referee in case of a vacancy in the office of the master-in-equity, disqualification of the master-in-equity, or for good cause. However, section 15-31-150 provides a constraint on section 14-11-60. Section 15-31-150 states that "[t]he provisions of Sections 14-2-50, 14-11-10 to 14-11-90 . . . and 15-39-490 shall not be construed as preventing a circuit court from appointing a special referee in the manner as provided in Section 15-31-140." S.C. Code Ann. § 15-31-150 (1979).

Section 15-31-140¹, referred to in the text above, was repealed by 1985 Act No. 100, Section 2. It was replaced by Rule 53, SCRPC. S.C. Code Ann. § 15-31-150, Editor's Note; *1976 South Carolina Code of Laws Unannotated, Updated through the end of the 2000 Session*, South Carolina Legislature, <https://www.scstatehouse.gov/Archives/CodeofLaws2000/t15c031.php>. Rule 53 articulates the *specific rule* that in a default case, some or all of the causes of action may be referred to a special referee by order of a circuit judge or the clerk of court. Rule 53, SCRPC. Rule 53 does not impose any further requirements, such as an articulation of the reason for the appointment, on a circuit judge issuing an order of reference appointing a special referee. Furthermore, 1985 Act No. 100, Section 3 states that “[i]n event of conflict between any provision of the South Carolina Rules of Civil Procedure and any other statutory provisions as to practice and procedure not repealed in this act, *the provision of the rules shall control.*” Act No. 100, Section 3, 1985 S.C. Acts 280 (emphasis added).

A court's primary function in interpreting a statute is to ascertain the intent of the legislature. *Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998). Generally, statutes are to be construed with reference to the whole system of law of which they form a part. *Id.* (citing 82 C.J.S. *Statutes* § 362 (1953)). Section 14-11-60 provides a general rule for the referral of a special referee in matters in which the parties consent, contingent on three restrictions. In contrast, Rule 53 provides a specific rule allowing a special referee to be appointed in default cases, without imposing the requirements of section 14-11-60. The consent of the parties is not necessary under the Rule, as one of the parties is in default. Therefore, this action was appropriately referred to the Special Referee under Rule 53.

¹ S.C. Code Ann. § 15-31-140 was entitled “Choosing of referees.”

To the extent that there is conflict between Rule 53 and section 14-11-60, the plain language of section 15-31-150 indicates that section 14-11-60 should not preclude a circuit court from appointing a special referee. Additionally, Act No. 100, which implemented the South Carolina Rules of Civil Procedure, mandates that in the event of conflict between the rules of civil procedure and statutory law, the rules of civil procedure are to prevail. Rule 53 authorized the Dorchester County Court of Common Pleas to appoint Judge Sanders as Special Referee over this action, as Schumacher was in default. Since the General Assembly has indicated that Rule 53 should take precedence over any statutory law regarding civil practice and procedure, the Special Referee had subject matter jurisdiction over this action. The Court should affirm the judgment of the Special Referee.

III. The Evidence Reasonably Supports the Special Referee's Damages Award.

The Special Referee's damages award should be affirmed by the Court, as evidence exists to reasonably support his conclusion. "Where an action at law is tried before a Special Referee, or a Judge, without a jury, the findings of fact have the same force and effect as the verdict of a jury, unless the trial officer has committed some error of law leading him to an erroneous conclusion, or unless the evidence is reasonably susceptible of the opposite conclusion only, his finding of fact must be accepted by this Court." *Evatt v. Campbell*, 234 S.C. 1, 11, 106 S.E.2d 447, 452 (1959). Therefore, so long as there is evidence to sustain the conclusion reached by the Special Referee and the Circuit Judge upon the issue made by the complaint, the Special Referee's damages award must be affirmed. *Id.*

The trial judge has considerable discretion regarding the amount of damages, both actual or punitive. Because of this discretion, our review is limited to the correction of errors of law. *Our task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award.*

Solley v. Navy Federal Credit Union, Inc., 397 S.C. 192, 203, 723 S.E.2d 597, 602 (Ct. App. 2012) (emphasis added).

A defendant in default is limited in his participation in the damages hearing to cross-examination and objection to the plaintiff's evidence; he is not permitted to introduce contrary evidence. *Limehouse v. Hulsey*, 404 S.C. 93, 116, 744 S.E.2d 566, 579 (2013). Consequentially, the strength of the defendant's cross-examination and objections must negate the proof offered by the plaintiff for him to have any chance of prevailing. *See Jackson v. Midlands Human Res. Ctr.*, 296 S.C. 526, 529, 374 S.E.2d 505, 506 (Ct. App. 1988) (finding that the award of damages in a default case is limited by the allegations of the complaint and the proof submitted at the damages hearing). While a defendant in default can participate in the damages hearing and may contest the monetary amount of damages through cross-examination and objections, he is considered to have admitted liability, which includes the requisite elements of duty, breach, and causation. *See Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 90, 757 S.E.2d 557, 558-59 (Ct. App. 2014).

A layperson is permitted to testify to the amount of damages, so long as her opinions are rationally based on her own perceptions, are helpful to a determination of the amount of damages, and do not require special knowledge, skill, experience or training. Rule 701, SCRE. The testimony of a witness with knowledge of the amount of damages is a valid means to authenticate evidence of the amount of damages. Rule 901, SCRE. Here, Ms. Rickenbaker has provided testimony supporting the amount of damages for each component of the home that needed to be repaired, cleaned, replaced, inspected and moved. She has also provided testimony regarding the loss of rent income the Rickenbakers incurred as a result of the mold infestation. The testimony supporting the amount of damages was based on estimates received from

professionals offering services that were necessary to restore the home to its original condition, or work that had already been performed on the home.

Counsel for Schumacher devoted the majority of his cross-examination of Mrs. Rickenbaker to attacking the underlying issue of liability, attempting to show that Mrs. Rickenbaker's testimony did not support a finding that the mold infestation had caused the damages. Counsel for Schumacher also attempted to introduce contrary evidence in the form of a report disputing the presence of mold in the home. However, Schumacher is considered to have already admitted to liability, including the issue of causation. Nowhere during cross-examination does Schumacher's counsel dispute the dollar amount of the estimates provided by Mrs. Rickenbaker, nor does he dispute that Mrs. Rickenbaker was provided with valid estimates.

Appellant takes issue with the \$22,000 estimate to have the flooring replaced. Schumacher states in its brief that the estimate was not provided by a professional service. However, Mrs. Rickenbaker's testimony explains that they received three estimates for the flooring, and that she believes the \$22,000 estimate was from Lowe's. Hr'g Tr. 42:15-42:23. Schumacher further contends in its brief that the Rickenbakers did not provide a source or copy of estimates for several categories of damages, including for cleaning and repairing the home, drains, sub-flooring and joists, and for moving items. As the Special Referee was authorized to act in the role of factfinder, he was allowed to determine the credibility of Mrs. Rickenbaker's testimony regarding the amount of damages and presume that she was giving accurate accounts of the costs and estimates associated with the mold infestation.

The Special Referee was present at the damages hearing and as such was in the best position to assess the credibility of the witnesses' testimony, and his findings of fact must be accepted by the Court unless the only reasonable conclusion that can be had from the hearing

testimony is that the offered damages evidence is incorrect. Schumacher's cross-examination did nothing to impeach Mrs. Rickenbaker's credibility. Thus, it was in the Special Referee's discretion to accept her testimony as true as to the amount of damages. Since Schumacher's cross-examination did not impeach her testimony, and the substance of its objections and cross-examination do not render the Special Referee's damages award unreasonable as a matter of law, the Special Referee had reasonable support upon which to base his damages award, and the judgment should be affirmed.

CONCLUSION

The Supreme Court of South Carolina has held that a direct appeal will not lie from a default judgment. On this ground alone, the appeal should be dismissed. Even if the appeal is not dismissed, the circuit court was authorized to appoint the Special Referee pursuant to Rule 53, SCRCP, regardless of the potential presence of a conflicting statute, because the General Assembly has explicitly stated that the Rules of Civil Procedure are to prevail over statutory law concerning civil practice and procedure.

As Schumacher is in default, it was properly proscribed from offering any evidence at the damages hearing. Therefore, the only means for Schumacher to refute the Rickenbakers' evidence was by impeaching their testimony as to the amount of damages. Schumacher failed to do so. Since the matter was properly before the Special Referee, and Schumacher has not established that the amount of the damages is incorrect, the judgment of the Special Referee should be affirmed.

Respectfully submitted,

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

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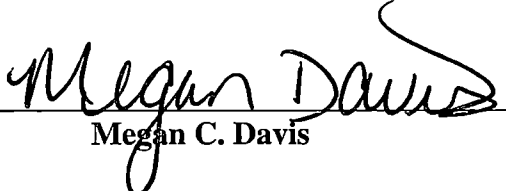
Schumacher Homes of South Carolina, Inc., Appellant,

CERTIFICATE OF SERVICE

This is to certify that I, *Megan C. Davis*, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Counsel for the Respondents, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within *Respondents' Initial Brief* to:

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

Dear Ms. Kitchings:

Please find enclosed the original and two copies of Respondents' Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Certificates of Service in the above referenced matter. Please file the originals and return clocked-in copies of each in the envelope provided.

By copy of this letter, Respondents' Initial Brief and Designation of Matter are being served on all counsel of record.

With kind regards, I am

Sincerely,


William F. Barnes, III

WFB/mcd
Enclosures as stated

cc: K. Michael Barfield, Esquire
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