THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2018-CP-26-00789

Roger D. Herrington II .... Respondent,

v.

Roger Dale Herrington and Eunice M. Herrington .... Appellants,

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INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN DELEGATING ITS EQUITABLE POWER TO THE JURY TO DECIDE THE UNJUST ENRICHMENT CLAIM?

II. DOES LACHES BAR PLAINTIFF'S CLAIM FOR UNJUST ENRICHMENT THAT ACCRUED NEARLY TEN YEARS BEFORE HE FILED THIS ACTION?

III. DID THE TRIAL COURT ERR IN REFUSING TO DISMISS AND SET ASIDE THE JURY FINDING OF UNJUST ENRICHMENT?

IV. DID THE TRIAL COURT ERR IN ALLOWING PLAINTIFF TO TESTIFY AS TO THE VALUE OF COMMERCIAL EQUIPMENT WHICH VALUE WAS OBTAINED FROM OUTSIDE SOURCES?

STATEMENT OF THE CASE

On February 18, 2015, Plaintiff commenced this action against his parents Roger Dale Herrington ("Dale") and Eunice M. Herrington ("Defendants"). Plaintiff raised claims for breach of contract, unjust enrichment, quantum meruit and breach of contract accompanied by fraudulent act. Defendants answered and raised several defenses including statute of frauds, statute of limitations, laches and other equitable defenses. The case was stricken from the docket pursuant to Rule 40(j), SCRCP, and on February 6, 2018 it was restored to the active docket under the current 2018 case number.

On November 18 through 20, 2019, the Honorable Benjamin H. Culbertson ("Trial Court") presided over the jury trial for the action. After the close of Plaintiff's case, Defendants moved for a directed verdict to dismiss Plaintiff's claims. The Trial Court granted in part and denied in part the motion. It dismissed the claims for breach of contract and breach of contract accompanied by a fraudulent act based on the statute of frauds. It allowed the claim for unjust enrichment or quantum meruit to go to the jury. The jury returned a verdict in favor of Plaintiff in the amount of $170,005.00 against Defendants jointly and severally. On November 27, 2019, Defendants filed a motion for JNOV, NISI Remittitur or New Trial pursuant to Rules 50 and 59, SCRCP. The Court denied the motion on January 22, 2020 without a hearing. This appeal followed.

STATEMENT OF THE FACTS

In 1988, Roger Dale Herrington, I ("Dale") started a land clearing and septic tank business (hereinafter referred to as the "business"). (Trial Transcript, p. 117, ll. 15-18; R___). Dale began only installing septic tanks for homes and commercial properties, and then he grew the business to include land clearing and hauling dirt. (Id.) Dale acquired several large pieces of equipment to conduct his business. (Trial Transcript, p. 118, ll. 13-17; R___).

Plaintiff is Dale's son, and he began working for him well after the business was established. (Trial Transcript, p. 120, ll. 8-p. 121, l. 4; R____). Around 1995, Plaintiff began working for his father full time and he claims that his father immediately offered to give him the business if he worked there for 10 years or until 2005 or 2006. (Trial Transcript, p. 59, l. 24-p. 60, l. 11; R____). Beginning in 2006, according to the Plaintiff, he would own the business and pay Defendants $500 a week. (Id. at p. 65, ll. 16-23; R___). Starting in 1995 until he left in 2012, Plaintiff received a paycheck. (Id. at p. 66, ll. 7-14; R____). Plaintiff initially received $500 a week in pay, which was an increase to the amount he made in his former job, and that amount increased to $800 a week during his employment with the business. (Id. at p. 69, ll. 5-13; R____). Despite this alleged verbal agreement, the year 2006 passed and the business was not transferred to Plaintiff. (Id. at p. 71, ll. 4-12; R___). Plaintiff admitted he was paid a good salary while he worked for his father. (Id. at p. 91, ll. 19-21; R___).

Plaintiff began experiencing emotional issues at work which included episodes of rage and disappearing for days. (Id. at p. 124, ll. 5-22; R____). The problem escalated to the point that Defendants required Plaintiff to sign an agreement to conduct himself in a certain manner or face

termination. (Id. at p. 124, l. 23-p. 126, l. 5; R___ and Defendants' Exhibit 1; R___). The agreement was admitted into evidence. (Id.)

In January 2013, Dale was helping his pregnant granddaughter install a heater into her mobile home. (Trial Transcript, p. 127, l. 6-p. 128, l. 13; R___). Dale asked Plaintiff about a pipe fitting, and Plaintiff suddenly erupted into anger and threw a pipe at Dale and his pregnant granddaughter. (Id.) Plaintiff began cussing at his father, and Dale told him he was fired. (Id.) Plaintiff responded that he quit. (Id.) Plaintiff never returned to work for Defendants. (Id.) Instead, Plaintiff opened a competing business. (Id. at p. 138, l. 12-p. 139, l. 2; R___).

Plaintiff and Dale had another violent confrontation in 2014 when Plaintiff punched Dale through an open truck window. (Id. at p. 130, ll. 5-16; R___ and Defendant's Exhibit 2; R___). In 2015, Defendants sold the business to their son, Keith Herrington. (Id. at p. 131, ll. 23-25; R___). Plaintiff commenced this action in February 2015, almost 10 years after he was allegedly supposed to have the business.

A jury trial began on November 18, 2019. After the close of Plaintiff's case, Defendants moved for a directed verdict to dismiss the case. (Trial Transcript, p. 111, l. 15-112, l. 9; R____). The Trial Court granted Defendants motion for directed verdict to dismiss the legal claims for breach of contract and breach of contract accompanied by a fraudulent act. (Id.) However, it denied the motion as to the equitable claims of quantum meruit and unjust enrichment (hereinafter the claims are collectively referred to as "unjust enrichment"), which the Trial Court consolidated into one claim. (Id.) After the close of the evidence, Defendant renewed its motion for directed verdict as to the remaining unjust enrichment claim, which the Trial Court denied. (Id. at p. 219, l. 24-p. 220, l. 25; R____).

The jury returned a verdict in favor of Plaintiff in the amount of $170,005.00. The verdict appears connected to the equipment that Plaintiff testified the business owned when he quit in 2013. (Trial Transcript, p. 76, l. 18-p. 78, l. 17; R____). Plaintiff testified that the "John Deere place" and the "Chevrolet Place" put the values on the equipment and that he "looked up the price of the equipment" to testify as to the equipment's value. (Id. at p. 77, l. 2- p. 78, l. 5; R____). Defendants objected to the admission of the evidence, but the Trial Court overruled the objection. Id. After the verdict, Defendants filed a motion, pursuant to Rules 50 and 59, SCRCP, for JNOV, NISI Remittitur or New Trial. The Trial Court denied the motions.

ARGUMENT AND CITATION OF AUTHORITY

STANDARD OF REVIEW

The Trial Court submitted only the equitable claim of unjust enrichment to the jury. In an action in equity, tried by the judge alone, the Court of Appeals has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. Townes Associates, Ltd. V. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). The Court of Appeals may reverse a finding when it is demonstrated that the preponderance of the evidence is against the finding of the lower court. Pinckney v. Warren, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001).

I. THE TRIAL COURT ERRED IN DELEGATING ITS EQUITABLE POWER TO THE JURY TO DECIDE THE UNJUST ENRICHMENT CLAIM.

The right to a jury trial is historically for actions at law. Bateman v. Rouse, 358 S.C. 667, 673, 596 S.E.2d 386, 389 (Ct. App. 2004). Courts determine equitable issues. Id. A California Appellate Court described this dichotomy as follows:

> Those causes of action that were historically tried to a judge remain triable to a judge today because it is thought that the exercise of equitable powers "depend[s]

> upon skills and wisdom acquired through years of study, training and experience which are not susceptible of adequate transmission through instructions to a lay jury.

Hoopes v. Dolan, 168 Cal. App. 4th 146, 155-56, 85 Cal. Rptr. 3d 337, 343-44 (2008).

When the Trial Court dismissed the legal claims, it should have either excused the jury and decided the unjust enrichment claim itself or retained the jury and accepted the jury's verdict as advisory only. Instead, the Trial Court delegated its equitable power to the jury and accepted its judgment as correct. This was error and denied Defendants of the Trial Court's experience in analyzing and deciding claims that involve fairness. Defendants are entitled to a new trial decided by the Trial Court and not a jury.

II. LACHES BAR PLAINTIFF'S CLAIM FOR UNJUST ENRICHMENT THAT ACCRUED NEARLY TEN YEARS BEFORE HE FILED THIS ACTION.

The equitable doctrine of laches is "the neglect for an unreasonable length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Robinson v. Estate of Harris, 391 S.C. 114, 118, 705 S.E.2d 41, 43 (2011). To establish laches, a defendant must show: (1) delay, (2) unreasonable delay, and (3) prejudice. Hallums v. Hallums, 296 S.C. 195, 199, 371 S.E.2d 525, 528 (1988).

1. Unreasonable delay

Plaintiff alleges in 1995 or 1996 that his father verbally agreed to sell him the business in 10 years. 10 years expired in 2005 or 2006 with no sale, and at that point Plaintiff was on notice that the alleged contract had been breached. Despite this notice, Plaintiff continued to work for his father for another seven years before Plaintiff quit. Nine or ten years passed from the time that Plaintiff knew he had a claim against his father and the time he brought this action. Plaintiff

provides no reasonable excuse for waiting to bring the claim. The elements of delay and unreasonable delay are satisfied.

2. Prejudice

The trial to determine whether there was an agreement and whether Defendants breached it occurred almost 25 years after the alleged verbal agreement in 1995 and 15 years after the alleged breach. The recollection of witnesses fade over such a long period of time and witnesses become unavailable. For example, a key witness in this case was an employee named Archie Mack. Mr. Mack died before this matter came to trial. (Trial Transcript, p. 130, ll. 11-21; R____). The long passage of time prejudiced Defendants ability to defend the claim.

In Hallums v. Hallums, a mother claimed retroactive child support sixteen years after her claim for support accrued. 296 S.C. at 198-199, 371 S.E.2d at 528. The South Carolina Supreme Court held that the mother's delay led to a speculative award of damages and an award against a father whose circumstances changed since the time the claim accrued. Id.

Similarly, in this case, Defendants were unable to go back nearly 25 years to gather evidence to prove that Plaintiff's participation in the business conferred no benefit in addition to the salary he was paid. The jury apparently awarded damages based on the unsupported value of equipment as it existed in 2012 with no evidence that Plaintiff purchased the equipment or contributed it to the business. This measure of damages to quantify the alleged benefit was speculative and caused by the long passage of time.

Moreover, detrimental reliance on a delay in asserting a claim against property when that delay results in the defendant selling at a certain price in anticipation of a certain profit is

evidence of prejudice. Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 432-33, 673 S.E.2d 448, 456 (2009). Defendants sold the business in 2015, 10 years after the expiration of the alleged agreement with Plaintiff. Defendants only received the promise of weekly payments as consideration for the sale. They sold the business reasonably believing that they owned it and did not receive any type of lump sum cash payment for the equipment. Defendants' circumstances changed significantly since the time that Plaintiff's claim accrued, and they reasonably relied on the 10 year delay as evidence that Plaintiff would not assert a claim against the business when Defendants decided the terms of the sale.

Defendants were prejudiced by Plaintiff's unreasonable delay in bringing this action. Consequently, the doctrine of laches bars Plaintiff's unjust enrichment claim.

III. THE TRIAL COURT SHOULD HAVE DISMISSED OR SET ASIDE THE JURY VERDICT OF UNJUST ENRICHMENT

To recover on a theory of unjust enrichment, a plaintiff must prove: (1) a benefit conferred by the plaintiff upon the defendant; (2) the realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value. Swanson v. Stratos, 350 S.C. 116, 121, 564 S.E.2d 117, 119-20 (Ct. App. 2002). The jury awarded a verdict based on the value of equipment that Defendants owned in 2012.

The business gradually acquired equipment over the years usually through loans paid back by the business, and Plaintiff did not donate or contribute the equipment to the business. (Trial Transcript, p. 76, ll. 11-17; R____ and p. 118, l 12-p. 119, l. 10; R____). Plaintiff never legally held title to the equipment. (Id. at p. 100, ll. 2-24; R___). Moreover, Plaintiff was paid,

by his own account, a generous salary while he worked for Defendants. Plaintiff signed an agreement outlining the conditions that would result in his termination, and he violated those conditions when he attacked his father. Plaintiff quit and began a business competing against Defendants. The evidence demonstrated that Plaintiff did not confer a benefit on Defendants much less a benefit that Defendants unjustly or inequitably retained. The Trial Court should have dismissed the claim for unjust enrichment.

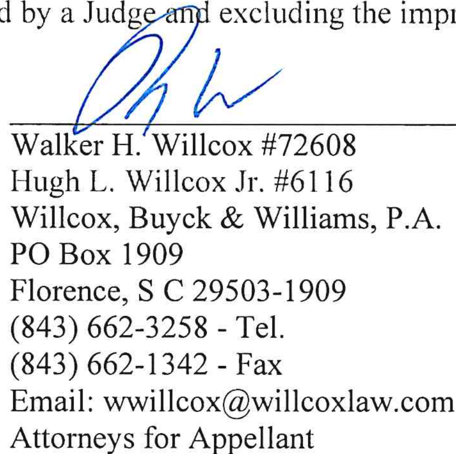
IV. THE TRIAL COURT ERRED IN ALLOWING PLAINTIFF TO TESTIFY AS TO THE VALUE OF COMMERCIAL EQUIPMENT WHICH VALUE HE OBTAINED FROM OUTSIDE SOURCES.

Plaintiff submitted a list of equipment which included the alleged value of the equipment in 2012. The purpose of the evidence was to demonstrate the value of the business in 2013 and the value of benefit he conferred to Defendants. However, Plaintiff admitted that he did not arrive at the values himself. He obtained them from a John Deere place and Chevrolet place. This source was undisclosed, and the equipment list was the measure of damages used by the jury for its damages award.

Ordinarily, a lay witness may not offer expert testimony. Rule 701, SCRE. An exception allows an owner to testify to the value of damaged personal property. Waites v. S.C. Windstorm & Hail Underwriting Asso., 279 S.C. 362, 366, 307 S.E.2d 223, 225 (1983). The Court allowed Plaintiff to testify as to the value of commercial equipment he did not own. Also, Plaintiff testified that he obtained the values from a John Deere and Chevrolet place. This testimony and documentary evidence were well beyond the exception described above. The Trial Court erred in admitting the evidence. The admission of the evidence prejudiced Defendants.

CONCLUSION

The doctrine of laches barred Plaintiff's unjust enrichment claim and the evidence did not permit a verdict in favor of Plaintiff on the claim. The Trial Court should have set aside the judgment and dismissed the unjust enrichment claim. Defendants request that the Court of Appeals reverse the Trial Court's refusal to do so and enter judgment for Defendants. In addition, the Trial Court improperly delegated its equitable power to the jury, and it improperly admitted the evidence of the equipment value. In the alternative, Defendants request that the Court of Appeals order a new trial conducted by a Judge and excluding the improper evidence.



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PROOF OF SERVICE

I certify that on August 21, 2020, I served the Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal on the Respondents, through his attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

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Re: Roger D. Herrington II v. Roger Dale Herrington and Eunice M. Herrington
Civil Case No: 2018-CP-26-00789
Our File No. 16079.16663

Dear Ms. Kitchings:

Kindly find enclosed please the original and one copy of Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal in connection with the above appeal. Please return a filed copy to my attention in the enclosed envelope.

Should you have any questions or concerns, please contact me at (843) 662-3258.

With kindest regards,

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WHW/asm
Enclosures
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