

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Richland County
Court of Common Pleas

Robert E. Hood, Circuit Judge
G. Thomas Cooper, Jr., Circuit Judge

Case No. 2017-CP-40-06433
Appeal No. 2020-000218

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Oct 19 2020

SC Court of Appeals

PTA-FLA, Inc,

Appellant-Respondent,

v.

TW Telecom Holdings, Inc., a Delaware
corporation; and DOES 1-10, inclusive,

Respondent-Appellant.

**FINAL RESPONDENT'S BRIEF OF RESPONDENT-APPELLANT
TW TELECOM HOLDINGS, INC.**

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STATEMENT OF THE ISSUES ON APPEAL

Respondent would restate the issues on this primary appeal from the final judgment as:

- I. Did the Trial Court properly apply the law on damages for Plaintiff's claim of breach of contract accompanied by a fraudulent act?
- II. Did the Trial Court properly award direct damages in the amount of \$9,218.42 based on the evidence of overpayments under the contract?
- III. Did the Trial Court properly deny an award for special delay damages?
 - A. Did the Plaintiff fail to plead special damages with sufficient specificity as required by Rule 9(g), SCRCP?
 - B. Did the Plaintiff fail to present evidence sufficient to permit calculation of special damages with a reasonable degree of certainty and accuracy?

STATEMENT OF THE CASE

Overview

This is a breach of contract case in which the Defendant failed to timely answer the complaint and judgment was entered for the Plaintiff after a damages trial. On appeal this Court is presented with a number of issues for appellate review of the final judgment awarding damages to the Plaintiff as well as various pretrial orders¹. The cross appeal filed by the Defendant presents issues challenging the Trial Court's denial of its Rule 55(c), SCRCP, motion to set entry of default and the Trial Court's order granting the Plaintiff's untimely motion to restore the case to the roster under Rule 40(j), SCRCP, after the statute of limitations had expired. The primary appeal filed by the Plaintiff presents issues challenging the amount of money awarded in the final judgment after the damages trial. The pertinent procedural history as to each set of issues presented on the cross appeal is set forth in detail in Respondent-Appellant's cross appeal brief, which is incorporated by reference as if fully restated herein. Accordingly, the foregoing Statement of the Case contains an abbreviated history of the pretrial proceedings and focuses on the allegations of the complaint and evidence presented at the damages trial.

Procedural History

The Plaintiff PTA-FLA, Inc. filed a complaint on March 3, 2015, which was served on March 16, 2015. [ROA 43, 211; Complaint.] When the Defendant TW Telecom did not timely answer or otherwise plead, the Plaintiff moved for entry of default which was entered on May 6, 2015. Although the Defendant served an answer together with a Rule 55(c) Motion to Set Aside Entry of Default and for a Late Answer the very next day, the Circuit Court Judge denied the

¹ The Court has also raised an issue of appellate jurisdiction over the cross appeal which is addressed in TW Telecom's appellant's brief.

motion as well as a motion for reconsideration. Notwithstanding that the Plaintiff had established liability by operation of the default, the Plaintiff did not move forward for a damages trial when the case came up on the trial roster, and instead, stipulated to a dismissal under Rule 40(j), SCRCF. Despite the fact that the Plaintiff did not move to restore the case within the one-year period as stipulated and the statute of limitations had expired, the Plaintiff was allowed to restore the case and proceed to a trial on damages.

The Plaintiff made a motion for judgment, filed October 20, 2017. [See ROA 389.] Thereafter, the case came before the Honorable Robert E. Hood for a trial of damages on January 31, 2019, at which the Plaintiff requested \$396,082.42 for direct damages and \$1,346,498 for delay damages, and presented a P&L summary as proof of the amount of delay damages. [ROA 110, 194; 1.31.19 Tr. 4, Ex. 2.] After the Defendant had the opportunity to cross examine the Plaintiff's witnesses, Judge Hood recessed the trial and ordered the Plaintiff to provide the Defendant with financial records to test the reliability of the P&L summary. [ROA 26; 1.31.19 Tr. 20.] The trial on damages resumed on December 3, 2019, at which time the Defendant cross examined the Plaintiff's development manager regarding the inaccuracies and lack of support for amounts in the P&L summary. [ROA 172-182, 188-190; 12.3.19 Transcript.] By order filed on January 13, 2020, Judge Hood awarded an amount of \$9,218.42 in direct damages for overpayments under the contract, but found that the Plaintiff had not presented sufficient competent evidence to support the amount of delay damages sought. [ROA 29; Order.] The Plaintiff did not make any motion for reconsideration of the damages order, and instead served a notice of appeal on February 11, 2020. [ROA 404; Notice of Appeal.]

Allegations of the Complaint

Subject to the cross appeal and without conceding the truth of the allegations in the Complaint, the facts are set forth below only as deemed admitted by operation of the default. Plaintiff PTA-FLA, Inc., a Florida corporation, provided wireless communication services in South Carolina and elsewhere under the brand "ClearTalk." [ROA 211; ¶1.] Defendant TW Telecom Holdings, Inc. provided fiber optic transport services and sold wholesale internet access in Columbia, South Carolina. [ROA 211; ¶2.] In 2010, the parties entered into an agreement for TW Telecom to provide wholesale internet and transport services to PTA-FLA to enable ClearTalk to offer data plans to its customers. [ROA 212; ¶8.] The initial contract period was for 28 months, to run from October 2, 2010, but the Complaint alleges circumstances and negotiations resulting in modifications and extensions to the contract. [ROA 217, 219; ¶41 (first revision), ¶58 (2012 new agreement).]

PTA-FLA acknowledges that TW Telecom began providing services in October 2010, but complains about early invoicing not corresponding with the contract payment schedule – even though the invoice was lower than the schedule amount. [ROA 214; ¶¶20, 21.] Then PTA-FLA complains about overcharges under the revised service agreement and a new agreement reached in 2012. [ROA 217, 220; ¶¶42-44, ¶66.] PTA-FLA also complains that there were erratic service and bandwidth problems. [See e.g. ROA 216, 218; ¶¶30, 49.] In 2013, TW Telecom gave notice that it was terminating the agreement, and PTA-FLA had to switch to another provider. [ROA 220; ¶¶61-65.]

On these allegations, PTA-FLA asserted causes of action for breach of contract, breach of contract accompanied by fraudulent act, fraud in the inducement, and promissory estoppel. However, by the time of the damages trial four years later, PTA-FLA chose to pursue only its

cause of action for breach of contract accompanied by a fraudulent act. [ROA 391; Plaintiff's 1.24.19 Memo, p. 3. *See* also ROA 30; 1/13/20 Order, p. 2.]

The Damages Trial

PTA-FLA did not make a claim for any specific dollar amount of damages in its Complaint. In its pretrial memoranda, PTA-FLA made varied arguments about what damages it was seeking at trial. First, PTA-FLA argued that it should receive \$271,211 in direct damages and delay damages in an unspecified amount:

PTA-FLA paid TW Telecom a total of \$396,082.42 over the relationship. However, the value of the services was at most worth \$124,871.32. As such PTA-FLA should receive the amount it paid minus the value of the services it was given which totals at least \$271,211.10. [ROA 393; 1.24.19 Memo p. 5.]

Then, just days later, PTA-FLA supplemented its request for direct damages, asking the court “to award the full \$396,082.42 be refunded in lieu of the \$279,154 overpayment.” [ROA 397; 1.28.19 Supp. Memo p. 2.] In the supplemental memorandum, PTA-FLA also indicated that it would be requesting \$3,143,645 in delay damages. [ROA 400; 1.28.19 Supp. Memo. p. 5.] Then just three days later, at trial, PTA-FLA informed the Court it was “specifically asking for \$396,082.42 for direct damages as well as \$1,346,498 in damages related to delays from the defendant's misconduct, which totals \$1,742,580.42.” [ROA 110; 1.31.19 Tr. 4/7-10.] PTA-FLA endeavored to prove its damages through the testimony of one of the owners, Eric Steinmann who acted as its development manager, and a technical business consultant, John Goocher. [ROA 145; 1.31.19 Tr. 39.]

As to the request for direct damages, Steinmann, the development manager testified as to the lump sum amount of its payments as \$396,082.42. [ROA 120; 1.13.19 Tr. 14.] However, by cross examination, Defense Counsel took Steinmann through all the numbers month by month and forced him to admit the total it was obligated to pay under the contract added up to \$386,464.

[ROA 130-132; 1.31.19 Tr. 24/3 – 26/8. *See also* ROA 189; 12.3.19 Tr. 23/2-6.] Apart from the overpayment of \$9,218.42, PTA-FLA did not offer any evidence that the services received were valued less than the contract amounts.

As to the request for \$1,346,498 in delay damages, Steinmann generally explained his calculations in terms of its net loss for a six-month period from January 2011 through June of 2011, with certain adjustments for items he did not consider it “fair” to charge against TW Telecom for the delay. [ROA 120-122; 1.13.19 Tr. 14/15 – 16/2.] PTA-FLA proffered a Quickbooks summary report of its accounting records for that six-month period, but it did not have any of the financial documents to support the summary at trial. [ROA 122; 1.31.19 Tr. 16.] TW Telecom objected to the summary without access to the supporting underlying data under Rule 1006, SCRE. [ROA122-123; 1.31.19 Tr. 16-17.] The Court admitted the summary into evidence but directed PTA-FLA to turn over all the supporting document for Defendant’s review and gave TW Telecom the right to resume the trial for further cross examination on the delay damages:

I'm going to admit this exhibit to the extent that it's allowed as a summary. When this whole hearing is over, you're going to turn over all the supporting documentation and Mr. Hood is going to have time, along with his client, to review it. And if they want to come back and cross-examine this gentlemen again, I will allow that to happen. So I'm going to give you time to get it. I'm going to give you time to review it and based upon your review, if you need to go back on the record to cross-examine the witness about issues that you find in those documents, I'll set a special hearing, give you the opportunity to come in and do that's exclusively.

[ROA 126; 1.31.19 Tr. 20/1-13.]

PTA-FLA also called its consultant, Mr. Goocher, purportedly for the purpose of establishing the delay damages were reasonable. [ROA 151-162; 1.31.19 Tr. 55-56.] Plaintiff’s Counsel attempted to elicit an opinion from Goocher: “Are the numbers that you heard Mr. Steinmann say out of the ordinary?” [ROA 163; 1.31.19 Tr. 57/1-2.] However, Defendant objected on the grounds that the witness had not been qualified as an expert to render such an

opinion. [ROA 163; 1.31.19 Tr. 57/3-5.] Without waiting for the Trial Court to rule on the objection, Plaintiff's Counsel declined to ask any further questions and rested. [ROA 163; 1.31.19 Tr. 57/6-11.]

Subsequently, PTA-FLA produced certain financial records as ordered by the Trial Court, and the damages trial resumed to allow TW Telecom to cross examine Steinmann regarding the accuracy of and foundation for the numbers in his summary. During that cross-examination, it became clear that the summary was riddled with inconsistencies and inaccuracies that Steinmann could not explain. For example, PTA-FLA was claiming over \$459,000 for consulting fees in its summary, but on cross examination with the actual invoices, Steinmann had to admit that his numbers in the summary were inaccurate. [ROA 172-176; 12.3.19 Tr. 6/24 – 10/9.] There was a claim for "intercompany support" for \$59,943 for February -May 2011, but no invoices to support that amount. [ROA 177; 12.3.19 Tr. 11.] There was a claim for marketing promotion for \$44,150 for February to June of 2011, but the ledger only listed \$362.33 and Steinmann could not point to any documentation to support the claimed amount. [ROA 178-79; 12.3.19 Tr. 12-13.] Similarly, there was a claim for "customer care" of \$5059, the ledger entry only showed \$1712.80. [ROA 180; 12.3.19 Tr. 14.]

Unable to address cross-examination questions with clear, straightforward answers, Steinmann equivocated about changes in the accounting software and insisted that the ledgers, which had been provided by Plaintiff's own Counsel per the Trial Judge's instruction, were not the correct information. His inadequate responses and excuses included:

- ... but I don't know where this has come from. This is a single expense account listed next to an income account, so this -- you know, whatever the General Ledger would be for that

period would have all the accounts here, so I don't know where ... [ROA 179; 12.3.19 Tr. 13/10-14.]

- ... I don't have it [documentation] in front of me and I think if I had known you were asking about these, we -- I would have come prepared with all the backup for them. [ROA 179; 12.3.19 Tr. 13/19-21.]
- ... we provided y'all the documentation for backup on that and I think we asked if we wanted us to bring it here and we haven't, but we can. We can and, you know, it would take me some time to go through it, but I'm happy to do that. [ROA 180; 12.3.19 Tr. 14/7-11.]
- ... so I don't know how these can be the original ledgers from May of 2011, but ... [ROA 181; 12.3.19 Tr. 15/1-2.]
- ... is this the same ledger that supported all the other numbers? Are these the anomalies you found in the ledger that supported all these numbers? All these numbers are supported by ledger and backup, I believe, that we've provided. I'm not sure this is it. [ROA 181; 12.3.19 Tr. 15/9-14.]
- ... I don't think it's the document that's been provided to you and I would have thought that if we had a problem, you would brought -- bring it up and we could have clarified that for you. But I'm happy to do so if you want me to go back through the information in support of these numbers. [ROA 182; 12.3.19 Tr. 16/9-14.]

On redirect examination, Steinmann insisted that the ledger supported every number in the summary, and claimed that he could have explained all the questions if he had been asked ahead of time. [ROA 183-184; 12.3.19 Tr. 17/23 – 18/5.] The Plaintiff did not, however, make any motion for another recess to gather and present the underlying documentation to support his summary and explain the inconsistencies.

ARGUMENT

Applicable Law – Burden of Proof for Default Damages Generally

While a default operates as a concession of liability, a defendant's right to recover is not unlimited. Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc., 275 S.C. 556, 560, 274 S.E.2d 287, 289 (1981); Wiggins v. Todd, 296 S.C. 432, 435, 373 S.E.2d 704, 705–06 (Ct. App. 1988). A plaintiff may not recover relief beyond that which is demanded in the pleadings. Lewis, *id.*; Pinckney v. Atkins, 317 S.C. 340, 343, 454 S.E.2d 339, 341 (Ct. App. 1995). Concomitantly, a plaintiff still bears the burden of proving the amount of unliquidated damages by competent evidence that meets the preponderance standard. Lewis, *id.*; Howard v. Holiday Inns Inc., 271 S.C. 238, 246 S.E.2d 880, 881 (1978); Renney v. Dobbs House, Inc., 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981); Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC, 408 S.C. 87, 90, 757 S.E.2d 557, 558 (Ct. App. 2014); Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 202, 723 S.E.2d 597, 602 (Ct. App. 2012).

As held in Howard v. Holiday Inns, and as reaffirmed in Limehouse v. Hulsey, 404 S.C. 93, 744 S.E.2d 566 (2013), a defaulting defendant is entitled to notice of a damages trial, and a defendant has the right to participate by cross-examining witnesses and objecting to evidence on those damages issues with the aim to insure a fair judgment. Renney, 274 S.E.2d at 292. A defendant is also entitled to object to introduction of evidence beyond the allegations of the complaint. Pinckney, *supra*; [See also ROA 119-120; 1.31.19 Tr. 13/23 – 14/1.] Ultimately, it is the responsibility of the trial judge to make a judicial determination of the amount recoverable based on the proof in keeping with the allegations of the complaint and the prayer for relief. Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 528, 374 S.E.2d 505, 506 (Ct. App. 1988) (citing Lewis and Renney).

Standard of Review

Questions of law are subject to de novo review on appeal. Milliken & Co. v. Morin, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012). However, as to questions of fact, where an award of default damages is made by the trial judge, the standard of appellate review is the same as review of a jury's findings, and the award will not be reversed if there is any evidence to support the damages award. McNaughton v. Charleston Charter Sch. for Math & Sci., Inc., 411 S.C. 249, 768 S.E.2d 389, 396 (2015); Solley, 723 S.E.2d at 602. Under the any evidence standard, the appellate court looks at the evidence in the light most favorable to the respondents, and leaves questions regarding credibility and weight of evidence exclusively for the trial court. Solley, id.; Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 310–11, 594 S.E.2d 867, 873 (Ct. App. 2004).

A trial judge has considerable discretion in determining the amount of actual damages. Based on this discretion afforded to trial judges, review on appeal is limited to the correction of errors of law. Accordingly, this Court's task in reviewing a damages award is not to weigh the evidence, but to decide if any evidence exists to support the damages award.

McNaughton, 768 S.E.2d at 396 (citations omitted).

Summary of Arguments

As separately argued in the cross appeal, TW Telecom maintains that the judgment should be vacated because the case had been dismissed by Stipulation and untimely restored beyond the one-year period agreed to in the Stipulation of Dismissal and beyond the three-year statute of limitations. In the alternative, TW Telecom submits that the Trial Court erred, on points of law, in denying the Rule 55(c) motion to set aside entry of default, where the Defendant made the requisite showing of mere good cause and justice would best be served to allow the Defendant to answer and defend on the merits. Subject to those issues, TW Telecom maintains the amount of damages awarded should be affirmed as consistent with the applicable law and evidence of record.

By operation of Rule 55, the entry of default amounts to an admission of properly pled facts as alleged in the Complaint. However, it does not entitle the Plaintiff to judgment in just any amount of damages it tries to claim. The Plaintiff still had the burden to prove its damages at trial, and the Defendant had the right to cross examine the Plaintiff's witnesses and object to evidence. The Trial Court had the responsibility to judge credibility and weigh the evidence submitted, and awarded only direct damages in the amount of overpayment under the contract. As discussed below, the Trial Court did not err on any point of law in its award of damages, and the amount of the award is supported by evidence or lack thereof. Therefore, the judgment on damages should be affirmed.

THE TRIAL COURT PROPERLY APPLIED THE LAW ON BREACH OF CONTRACT DAMAGES TO THE PLAINTIFF'S CLAIM AS PLED AND PROVEN AT TRIAL.

I. The Plaintiff pled a cause of action for breach of contract accompanied by a fraudulent act, but only presented evidence of damages for a simple breach of contract.

Although PTA-FLA pled multiple causes of action, it elected to seek judgment only as to its cause of action for Breach of Contract Accompanied by Fraudulent Act: "Plaintiff has elected to proceed under the Breach of Contract Accompanied by Fraudulent Act cause of action." [ROA 391; Plaintiff's 1.24.19 Memo, p. 3.]

A claim for breach of contract accompanied by a fraudulent act is not a fraud claim nor is it a combination of a claim for breach of contract and a claim for fraud. Harper v. Ethridge, 290 S.C. 112, 348 S.E.2d 374, 378 (Ct. App. 1986); Ball v. Canadian American Exp. Co., Inc., 314 S.C. 272, 276, 442 S.E.2d 620, 622 (Ct. App. 1994). "There is no cause of action distinct from breach of contract for breach of contract accompanied by a fraudulent act." Smith v. Canal Ins. Co., 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980). Rather, it is simply a breach of contract claim

in which punitive damages may be recovered upon proof of a predicate fraudulent act associated with the breach. *Id.*; Ateyeh v. Volkswagen of Florence, Inc., 288 S.C. 101, 341 S.E.2d 378, 379-80 (1986).

In this case, PTA-FLA did not pursue its claim for punitive damages at the damages trial, for as stated by the Trial Judge: “Plaintiff has not request punitive damages in this Motion and did not set forth evidence related to punitive damages at the hearing.” [ROA 30; 1.13.20 Order, p. 2 n.1. *See also* ROA 393-394, 396-402; Plaintiff’s Memoranda of 1.24.19 and 1.28.19 (expressly seeking direct damages, delay damages and lost profits.)] Accordingly, the only cause of action was one of breach of contract for which PTA-FLA sought direct and delay damages.²

On appeal, PTA-FLA contends that the Trial Court erred in applying the law of damages for breach of contract accompanied by fraudulent act, arguing that the allegations of the Complaint proved intent to deceive as proof of actual fraud and fraudulent acts related to the invoicing in breach of the contract payment schedule. However, those arguments are irrelevant and immaterial because PTA-FLA dropped its fraud claim and it did not pursue or prove its original prayer for punitive damages. “An issue conceded in a lower court may not be argued on appeal.” TNS Mills, Inc. v. S.C. Dep’t of Revenue, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998); CFRE, LLC v. Greenville Cty. Assessor, 395 S.C. 67, 81, 716 S.E.2d 877, 885 (2011) (“A litigant cannot concede an issue at trial and then raise it on appeal.”) Thus, as addressed below, the only questions preserved for review are whether the Trial Court applied the correct law on breach of contract damages and whether there is any evidence to support the Trial Court’s award of direct damages and denial of delay damages.

² The Plaintiff also dropped its claim for lost profits at trial. [ROA 110; 1.31.19 Tr. 4/5-14. *See also* ROA 30; 1.13.20 order, p. 2 n.1.]

II. The Trial Court’s award of direct damages for overpayment is supported by evidence.

The Plaintiff affirmatively declared that it was seeking direct damages of \$396,082.42. [ROA 393, 110; 1.28.19 Supplemental Memo, 1.31.19 Tr. 4.] At trial, the development manager for PTA-FLA was called to prove that amount of direct damages and he testified baldly that he was seeking repayment of the entire amount that it had paid to TW Telecom over the two and a half years for the wireless communications services provided: “That's the amount that we have physical checks for or other forms of payment to TWT Telecom over the time we did business with them.” [ROA 120; 1.31.19 Tr. 14/7-9. *See also* ROA 128; 1.31.19 Tr. 22/5-6.] Even though PTA-FLA did not proffer any documents to support that amount, TW Telecom did not challenge the accuracy of the \$396,082.42 as the amount it was paid. However, through cross examination, Defense Counsel took the Plaintiff’s witness through all the figures month by month and forced him to admit the total it was obligated to pay under the contract, and established an overpayment of only \$9,218.42. [ROA 130-132; 1.31.19 Tr. 24/3 – 26/8.] Thus, the evidence supports the Trial Court’s award of the overpayment.

On appeal, PTA-FLA references arguments made in its pretrial memoranda about the value of the wireless services it received being less than what it contracted for, but arguments are not evidence and it offered no evidence on that point at the trial. S.C. Dep’t of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003). PTA-FLA also insists that it is entitled to reimbursement of the full amount it paid because the contract was induced by fraud and there was no meeting of the minds; however, PTA-FLA expressly dropped its claim for fraud in the inducement and affirmatively chose to pursue damages for breach of contract. [Initial Appellant’s Brief, p. 15.] *See Ball*, 442 S.E.2d at 623 (claim fraud relates to the making of the contract, breach of contract accompanied by a fraudulent act relates to the breaching of the contract).

PTA-FLA concedes that: “If this were simply a breach of contract, it may be reasonable to determine that PTA-FLA should be reimbursed what it overpaid.” [Initial Brief of Appellant-Respondent, p. 14.] Thus, to the extent that PTA-FLA only proved damages for a simple breach of contract, the Trial Court’s award of direct damages for the overpayment should be affirmed.

III. The Trial Court’s denial of delay damages is supported by the law and evidence.

The Plaintiff had the burden of pleading and proving his request for delay damages. Jackson v. Midlands Human Res. Ctr., 374 S.E.2d at 506. The Trial Court properly denied the request for delay damages because the Plaintiff did not meet either part of that burden. First, the Plaintiff did not sufficiently plead items of special damages as required by Rule 9(g), SCRCF. Second, its request for \$1,346,498 was not “coherently supported through evidence or testimony [sic] forth during the damages hearings.” [ROA 34; 1.13.20 Order p. 6.]

A. The Plaintiff did not specifically state items for special delay damages in the Complaint as required by Rule 9(g), SCRCF.

Rule 9(g), SCRCF states: “Special Damage. When items of special damage are claimed, they shall be specifically stated.” Damages for delays are special damages which must be pleaded. Walker v. Quinn, 134 S.C. 510, 133 S.E. 444, 450 (1926). “Where a plaintiff seeks special damages in addition to his general damages, he must plead and prove both the fact of damage and the amount of damage.” Jackson, id.; Norwest Properties, LLC v. Strebler, 424 S.C. 617, 624, 819 S.E.2d 154, 158 (Ct. App. 2018). “If a plaintiff seeks special damages for breach of contract, he must plead and prove both the fact of damage and the amount of damage with a reasonable degree of certainty.” Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff’d*, 307 S.C. 128, 414 S.E.2d 118 (1992).

PTA-FLA’s complaint does not contain any allegations of specific items of damages from any delay and only a conclusory mention of special damages in its prayer. [ROA 224; Complaint,

p. 14.] In arguing this point on appeal, PTA-FLA simply recites various allegations of its Complaint about the dealings and negotiations between the parties and accusations about the technology of the wireless service as erratic and disruptive, but none of those factual allegations include any *specific items* of delay damages. The allegations of the Complaint were not sufficient to meet the Rule 9(g) pleading requirement, and the denial of delay damages can be sustained on that reason alone.

B. The Trial Court wisely exercised its discretion in weighing the evidence offered to prove delay damages.

Even if, for the sake of argument, PTA-FLA met the pleading requirement of Rule 9(g), it still did not carry its burden of proving the amount of delay damages with competent evidence to a reasonable degree of certainty and accuracy. “[T]he existence or amount of damages cannot be left to conjecture, guess or speculation,” and the evidence presented should allow the fact finder to determine the amount with reasonable certainty or accuracy. Park Enterprises, Inc. v. Schofield, 251 S.C. 385, 391, 162 S.E.2d 705, 708 (1968) (citations omitted). “If the plaintiff’s proof is speculative, uncertain, or otherwise insufficient to permit calculation of his special damages, his claim should be denied.” Jackson, *id.*

Judge Hood found that the P&L Summary as testified to by Steinmann did not meet that burden, stating:

Other inconsistencies between the Plaintiff’s P&L Summary and their actual invoices and ledgers were revealed on cross-examination of Mr. Steinman. When viewed as a whole, this Court finds the testimony and evidence used in support of the delay damages contain inconsistencies that undermine the reliability of the claimed damages. The Plaintiff uses the P&L Summary in support of damages, but the reliability of that document has been undermined by its supporting documentation and conflicting testimony. Plaintiff concedes the supporting documentation is the best source of evidence, but Plaintiff has not proven through competent evidence or testimony clearly how the delay damages are justified or reasonably calculated. It is the Plaintiff’s burden of proof to prove their damages by the preponderance of the evidence by competent testimony. By relying on an

unreliable P&L Summary rather than actual documentation of their alleged damages, the Plaintiff has failed to meet their burden of proof as to their claim for delayed damages. [ROA 36; 1.13.20 Order, p. 8.]

Apart from finding that PTA-FLA did not meet its burden as to the specific amount of the claimed delay damages, Judge Hood also found that: “The confusion and inconsistencies concerning the alleged delay period and basis for the delay undermines the reliability of the alleged delay damages as a whole.” [ROA 35; 1.13.20 Order, p. 7.] Based on the applicable standard of review, the Trial Court’s findings and conclusions are based on evidence of record and should, therefore, be affirmed.

In an attempt to prove its request for \$1,346,498 in delay damages, PTA-FLA offered a Quickbooks summary report of its accounting records through the testimony of development manager, Steinmann. TW Telecom objected to the summary without access to the supporting underlying financial documents data under Rule 1006, SCRE, which provides that:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation, provided the underlying data are admissible into evidence. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

The Trial Court admitted the summary into evidence but directed PTA-FLA to turn over all the supporting documents for TW Telecom’s review and gave TW Telecom the right to resume the trial for further cross examination on the delay damages. In so doing, the Trial Court fulfilled its responsibility under Rule 1006. State v. Warner, 430 S.C. 776, 842 S.E.2d 361, 371 (Ct. App. 2020) (“A trial court must therefore be vigilant in ensuring a Rule 1006 summary is an accurate portrayal of the underlying evidence.”).

When the damages trial resumed with cross examination of Steinmann and TW Telecom delved into the foundation for the summary with the underlying documentation, it became readily

apparent that the summary was riddled with inconsistencies and inaccuracies that Steinmann could not explain or verify. As recounted above, there were amounts for items without any invoices or other documentation, and there were highly inflated amounts for items for thousands of dollars that appeared in the financial ledger for only a few hundred dollars. The Trial Court particularly noted PTA-FLA's claim for delay damages included \$459,399 in consulting fees that could not be substantiated where the ledger shows only \$140,000. [ROA 36; 1.13.20 Order p. 8.]

The Trial Court also observed inconsistencies in the evidence of the purported six-month period (January 2011 to June 2011) of "delay" for which the Plaintiff sought damages. [ROA 35; 1.13.20 Order, p. 7.] As reflected in the Record, while the Complaint vaguely mentioned problems with erratic service in April 2011, Steinmann [who had not even read the Complaint³] just *assumed* that the delay began earlier:

A: That's what it [the complaint] says, in or prior to April of 2011.

Q: Okay.

A: I assume that was prior to April 2011 that we noticed that.

[ROA 216; Complaint ¶30. ROA 156; 1.31.19 Tr. 50/9-12.]

The P&L summary was allowed into evidence, but such inconsistencies still could be considered by Judge Hood in determining credibility and weighing the evidence. Southern Realty & Const. Co. v. Bryan, 290 S.C. 302, 313, 350 S.E.2d 194, 200 (Ct. App. 1986) (inconsistencies can raise an issue of credibility); Small v. Pioneer Mach., Inc., 329 S.C. 448, 465, 494 S.E.2d 835, 843 (Ct. App. 1997) (inconsistencies in evidence go to the weight as judged by the factfinder). It was for the trial judge, as the factfinder, to weigh the credibility of the summary and the testimony, and Judge Hood acted within his province in concluding that the existence of damages from the

³ "You're reading the complaint. I haven't read it." [ROA 155; 1.31.19 Tr. 49/21.]

alleged delay as well as the reliability of the amount claimed was undermined by the conflicting testimony and lack of supporting documentation. Solley, 723 S.E.2d at 602 (credibility and weight of evidence are exclusively for the trial judge); Frampton v. S.C. Dep't of Transp., 406 S.C. 377, 391, 752 S.E.2d 269, 277 (Ct. App. 2013) (appellate court should not second-guess determination of credibility by the trier of fact).

At trial, Steinmann offered excuses for his inability to explain the inconsistencies ranging from confusion about changes in the accounting software to accusations that the ledgers used in cross-examination were not the documents provided by Plaintiff's counsel. Steinmann also tried to turn the blame to TW Telecom for not identifying the inconsistencies prior to the trial and for not asking him to bring the documentation to trial. Steinmann insisted that the ledger supported every number in the summary, and claimed that he could have explained all the questions if he had been asked ahead of time. On appeal, PTA-FLA again presents the contentions that "the documents themselves would be the best resource," but TW Telecom did not ask for the boxes to be brought to trial. [Appellant's Initial Brief, p. 20.]

PTA-FLA ignores the fact that it had the burden of proving its damages. PTA-FLA was permitted to submit a bookkeeping summary without introducing the supporting financial records, but consonant with Rule 1006, TW Telecom had the right to use the underlying documents for cross examination and Judge Hood had the right to assess the credibility and weigh the evidence. United States v. Strissel, 920 F.2d 1162, 1164 (4th Cir. 1990) (underlying evidence must be available for a proper cross examination); United States v. Massey, 89 F.3d 1433, 1441 n.9 (11th Cir. 1996) (the fact-finder is not required to accept the information presented in a summary as true).

PTA-FLA also has no reasonable basis for blaming TW Telecom for its lack of preparation. Given that the Trial Court had recessed the trial in January 2019 to give the Defendant the opportunity to review the underlying documents, PTA-FLA clearly should have anticipated that it would be subject to cross examination when the trial resumed in December 2019. TW Telecom was under no obligation to demand that PTA-FLA bring and/or proffer the underlying documents to meet the cross examination. PTA-FLA should have been prepared to justify/explain the numbers in its summary to carry its burden of proof. Moreover, even while insisting the documents were the best evidence, Plaintiff did not move for another recess to gather the documents to support the summary and address the inconsistencies. *See Degenhart v. Knights of Columbus*, 309 S.C. 114, 118, 420 S.E.2d 495, 497 (1992) (party did not move for continuance to protect its interests).

CONCLUSION

WHEREFORE, based on the arguments presented in the cross appeal, TW Telecom respectfully maintains that the judgment should be vacated and the case should be dismissed because the case was restored untimely, or at the least, the case should be remanded to set aside entry of default and to allow the Defendant to answer and defend on the merits. In the alternative, TW Telecom respectfully submits that the amount of damages awarded to PTA-FLA should be affirmed as consistent with the applicable law and evidence of record.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

/s/ Robert H. Hood, Jr.

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October 19, 2020

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