THE STATE OF SOUTH CAROLINA

In the 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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On February 18, 2015, Respondent, Dale Herrington, II, commenced this action against his parents, Roger Dale Herrington and Eunice M. Herrington, Appellants. Respondent raised claims for breach of contract, unjust enrichment, quantum meruit and breach of contract accompanied by fraudulent act. Appellants answered and raised several defenses including statute of frauds, statute of limitation, laches and other equitable defenses. The case was stricken on February 21, 2017 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, 2018 the Honorable Benjamin H. Culbertson ("Trial Judge") presided over the jury trial for the action. After the close of Respondent's case, Appellants moved for a directed verdict to dismiss Respondent's claims. The Trial Judge granted in part and denied in part the motion. He dismissed the claims for breach of contract and breach of contract accompanied by a fraudulent act based on the statute of frauds. The Trial Judge allowed the claim for unjust enrichment or quantum meruit to go to the jury. The jury returned a verdict in favor of Respondent in the amount of $170,005.00 against Appellants jointly and severally. On November 27, 2019, Appellants filed a motion for JNOV, NISI Remittitur or New Trial pursuant to Rules 50 and 59, SCRCP. The Trial Judge denied the motion on January 22, 2020 without a hearing. This appeal followed.

STATEMENT OF FACTS

Roger Dale Herrington ("Dale") and his wife, Eunice Herrington ("Eunice") had a business in 1995 called Dale Herrington Septic Tank and Land Clearing. (R. pp. 077-078; R. p. 270). Their son, Roger Dale Herrington, II ("Roger") also had a septic tank business called A.A.A. Septic and Land Clearing. (R. p. 079; R. p. 211). The father, mother and son in late 1995 entered into a verbal agreement to combine their businesses. (R. p. 076, lines 8-12; R. p. 080-083; R. p. 272).

The new business was called Herrington's Septic Tank and Cleanup ("business"). Roger was to work side by side with Dale in the field and was to be paid five hundred ($500.00) dollars per week. (R. pp. 079-080). Eunice was to run the office for the business. (R. p. 081, lines 2-10). All of the profits from the business made were to go to Dale and Eunice. (R. p. 086, lines 4-17). Roger was to work in the business for ten (10) years and then the ownership of the business was to be turned over to him. (R. p. 081, lines 2-13). He was then supposed to pay Dale and Eunice five hundred ($500.00) dollars per week for the rest of their lives. (R. pp. 84-086).

Dale became disabled as a result of a car accident in 1999 and Roger had to do all of the work for the business. (R. pp. 085-089). Dale was paralyzed from the neck down. (R. p. 089, line 14-p. 089, lines 1-19). Roger's income was increased to eight hundred ($800.00) dollars per week due to Dale's inability to help with the work.

R. p. 089, lines 1-14; R. p. 090). In 2006 the business was not turned over because Eunice asked Roger to wait a few years and leave the business as it was until she could get the Social Security resolved. (R. p. 088, line 21-p. 091). Roger considered the business to be his then until Dale and Eunice sold it to another son, John Keith Herrington (R. p. 094, lines 1-24; p. 151, lines 23-24; p. 206, lines 13-14).

Roger became concerned when Dale and Eunice started using funds from the business to buy a mobile home and set it up for their pregnant granddaughter. Roger, at that time was no longer receiving a check from the business. (R. p. 093, lines 1-9; p. 147). When Roger questioned Dale about it he claimed Roger was fired. (R. p. 148).

Dale and Eunice denied that there was an agreement between the parties. (R. p. 012, ¶4; T. p. 062). They claimed Roger had emotional and rage issues which resulted in his firing. (R. pp. 140-143). The existence of an agreement between the parties was corroborated by persons who had grave dislikes for Roger and nothing to gain from the trial, his ex-wife and ex-girlfriend. (R. pp. 054-059; pp. 062-064; pp. 067-070). Both testified, each at different times that they heard Dale, Eunice and Roger discuss the agreement; its terms of ten (10) years and the business would be turned over to Roger. (R. p. 056, lines 3-p. 059, lines 1-15; pp. 069-074).

A jury trial began on November 18, 2019 and the jury returned a verdict for Roger on November 20, 2019 in the amount of One Hundred Seventy Thousand & Five

(170,005.00) Dollars (R. p. 265, lines 3-20). This appeal follows.

STANDARD OF REVIEW

As indicated in Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773 (1976). In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings.

I. THE TRIAL JUDGE DID NOT ERR IN ALLOWING THE JURY TO DECIDE THE UNJUST ENRICHMENT CLAIM IN THIS CASE.

Roger did not ask for a jury trial in his pleadings but the Defendants did in their Amended Answer. (Caption) Actions for the recovery of money are actions at law. Bateman v. Rouse, 358 S.C. 667, 596 S.E. 2d 386 (S.C. App. 2004) **See also** SCRCP Rule 38(a). In this case, Roger asserted a legal cause of action for Quantum Meruit and sought money damages. (R. pp. 008-011).

Dale and Eunice claim that when the Trial Judge did not decide the unjust enrichment claim, they as litigants were deprived of the Trial Judge's experience in analyzing and deciding claims that involve fairness. Their claim, pursuant to a California case, Hoopes v. Dolan, 168 Cal. App. 4th 150, 85 Cal. Rptr. 3d 337 (2008) that this was error, but that's exactly what the Trial Judge did when he entertained and ruled on the Defendants' motions for directed verdict at the end of the testimony and for JNOV, NISI Remittitur or New trial after the jury returned its verdict.

Additionally, this specific issue was never presented to the Trial Judge for a ruling. To

reserve an issue for appellate review, a matter may not be raised for the first time on an appeal but must have been both raised and ruled upon by the court. Hill v. S.C. Dept. of Health & Environmental Control, 389 S.C. 21, 698 S.E. 2d 612, 613, (2010). Accordingly, this issue is not preserved for review by this court.

II. LACHES DID NOT BAR RESPONDENT'S CLAIM FOR UNJUST ENRICHMENT IN THIS CASE.

The doctrine of Laches does not bar Respondent's claim for unjust enrichment under the legal theory of quantum meruit. The judge properly charged the jury on the elements of quantum meruit and they returned a verdict for the Respondent. (R. pp. 260-265).

Appellants claimed Laches as a defense based upon unreasonable delay and prejudice. The evidence is clear that Roger was to take over the business in 2006. (R. p. 081, lines 2-13). Eunice, then asked Roger to leave the business as it was so she could continue to pay into her Social Security. (R. p. 088, lines 21-p. 091). Things were good business-wise and Respondent desired to continue to help his parents, so he said okay. Therefore, six years of the delay to which Appellants refer was induced by Eunice. Another year was consented to by the Appellants and their counsel when the Motion for 40(j) was filed in this case. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice or disadvantage to the other party, delay alone does not constitute laches. Hallums v. Hallums, S.C. 195, 371, S.E 2d 525 (1988).

Appellants claimed they were prejudiced by the death of a key witness, Archie Mack. Mr. Mack's testimony would have been about what Appellants view as Roger's rage. Additional, Persons, Keith Herrington and Samuel Scott were present with Mr. Mack and testified at the trial

on this same issue. Given the fact that the only facts the decedent, Mr. Mack, was to testify came from two other witness' testimony, the Appellants were not prejudiced by the death of Mr. Mack. (R. p. 188, lines 17-25).

III. THE TRIAL JUDGE DID NOT ERR IN REFUSING TO DISMISS OR SET ASIDE THE JURY VERDICT IN THIS CASE.

The Appellants correctly set forth the elements of unjust enrichment as (1) a benefit conferred by the Respondent upon the Appellants; (2) the realization of that benefit conferred by - Respondent; and (3) retention of the benefit by the Appellants under circumstances that make it inequitable for them to retain it without paying its value. Swanson v. Stratos, 350 S.C. 116, 121, 564 SE 2d, lines 7, 119-120 (Ct. App. 2002). The Trial Judge charged the jury the same three elements. (R. p. 260). Appellants are incorrect in concluding that the jury's award was based only on the value of the equipment. There is nothing in the record or anywhere else to support that assertion. Roger tried to get the Trial Judge to specifically include the word "equipment" in his charge to the jury and he refused. (R. pp. 242-244). Other damages were presented to the jury in this case. (R. p. 099, line 18- p. 100).

Roger conferred a benefit upon the Appellants by working and representing the business more than 15 years. (R. pp. 088-091). He did all of the labor, sales, field work as Dale was disabled, paralyzed from the neck down and could not help with the physical work. (R. pp. 085-089). There is no question that Eunice and Dale realized a benefit, not only were they able to live on the income from Roger's services but the business thrived. They were left with something to sell for which they were offered Two Hundred Fifty Thousand ($250,000.00) Dollars (R. p. 091, lines 18-24; R. p. 095, lines 19-21).

The Defendants retained profits from the business, its equipment, and a good reputation, and for them to keep anything under the promises presented in this case gave the jury a basis to award damages for unjust enrichment.

IV. THE TRIAL JUDGE DID NOT ERR IN ALLOWING RESPONDENT TO TESTIFY AS TO VALUE OF COMMERICAL EQUIPMENT IN THIS CASE.

Respondent submitted a list of equipment acquired by the business during the 15 years he worked for the business. Appellants are correct that it was to be held to demonstrate the value of services conferred on the Appellants. The Respondent was the owner of this equipment as owner of the business. It should be noted that the equipment was acquired at different times; Respondent worked with it, had repairs done to it and was familiar with their general values, therefore his view of the values were rationally based on his perception. Lay people can give testimony as to the value of property owned by them. SCRCP Rule 701.

(R. p. 273).

Appellants claim that the list was the measure of damages used by the jury for its damages award. Appellants miss two things with that assertion. First, the list of equipment's total value was more than Two Hundred Fifty Thousand ($250,000.00) Dollars and the Appellants were offered Two Hundred Fifty Thousand ($250,000.0) Dollars for the business. (R. p. 094, lines 18-24; p. 095, lines 19-21).

CONCLUSION

For the reasons stated above, this Court should sustain the jury's verdict in this case.

RESPECTFULLY SUBMITTED,

BY _____

CONEAY, SOUTH CAROLINA

OCTOBER ____, 2020

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The undersigned certify that the Final Brief complies with Rule 210 (b) and 211 SCACR.

RESPECTFULLY SUBMITTED,

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OCTOBER 30, 2020

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