THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY

Teasa K. Weaver, Master in Equity

Appellate Case No. 2020-001023

Mark Giles Pafford,

Appellant

v.

Robert Wayne Duncan, Jr.,
Robert Duncan, Sr., and Frank Eason,
d/b/a Rock City Heavy Hauling, Inc.,
Defendants,

of whom Robert Wayne Duncan, Jr. and
Robert Duncan, Sr. are the Respondents.

INITIAL BRIEF OF RESPONDENTS

Stephen D. Schusterman
SCHUSTERMAN LAW FIRM, PA
Post Office Box 4211
Rock Hill, South Carolina 29732
(803) 325-7788
SC Bar No.: 11979
Email: sdslaw@comporium.net

Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

1. THE FACTS PRESENTED PROVE FRAUD ON THE PART OF THE APPELLANT AS TO THE VEHICLE CONTRACT.

2. THE CLAIM OF FRAUD IS NOT PRECLUDED BY WAIVER OR ESTOPPEL.

3. THE EVIDENCE PRESENTED DOES NOT ALLOW THE APPELLANT TO A CLAIM OF UNPAID WAGES

4. THERE IS CREDIBLE EVIDENCE TO ESTABLISH THE WORTH OF THE RETURNED THUNDERBIRD.

5. THERE IS CREDIBLE EVIDENCE OF THE DAMAGES FROM APPELLANT'S ATTEMPT AT REPOSSESSION.

STATEMENT OF THE CASE

The Appellant was an independent contractor for Rock City Heavy Hauling, Inc. The Respondents are the owners of Rock City Heavy Hauling, Inc.

The Appellant and Respondent Duncan, Jr. entered into an agreement for the purchase of a used 2003 Kenworth W 3900 truck, a 1998 Trailking trailer, 2009 Trailking trailer (hereinafter referred to as "vehicles") and a clip axle for $95,000.00. Appellant also worked for Respondent for a period of time.

The Appellant and Respondent also entered into a subsequent agreement for Respondent to purchase a Thunderbird automobile for $14,000.00 the amount to be deducted from the balance owed to Appellant. The Appellant took possession of this vehicle but subsequently decided he did not want the vehicle and had it dropped off at the Respondents business, unbeknownst to the Respondents. This vehicle was ultimately sold by the Respondents to a third party for $8,000.00.

The Appellant filed a Summons and Complaint on August 24, 2017 seeking a claim and delivery of his vehicles. An Amended Summons and Complaint was filed on April 4, 2018 where the Appellant sought unpaid wages, penalties, and attorney's fees.

The Respondents timely filed an answer and counterclaim against Appellant asserting breach of the agreement as Appellant refused to release title to the vehicles despite payment, fraud, and negligent misrepresentation due to Appellant's inability to produce and/or transfer title.

The Respondents are also seeking damages to property that occurred when Appellant entered onto Respondents property in an attempt to repossess the vehicle and damaged the Respondents garage as well as a motorcycle located inside.

After a hearing without a jury, the Court found that both parties acknowledged that funds had been paid to the Appellant by the Respondent. The Court further found that the parties did not disagree as to the amount of monies that had been paid but rather disagreed as to how the money was to be applied, as well as whether Appellant's weekly earnings had increased four months into his employment. The Court ultimately found that the Appellant earned wages of $91,000.00. The Court also found that the Respondents owed to the Appellant the sum of $11,067.52 for expenses. The Court further found that the Respondent owed to the Appellant $95,000.00 for the vehicles.

The Court also found that the Respondent had paid to the Appellants the total of $163,000.00 towards wages and vehicles/equipment. The Court ultimately found that after damages and offsets, the Appellant was liable to the Respondent in the amount of $33,568.09 and a separate $4,195,00 to Respondent Duncan, Sr. Additionally, Appellant was ordered to transfer title of the 2003 Kenworth and the 1998 TrailKing trailer. Respondents were required to return the 2009 TrailKing Trailer to Appellant.

Appellant filed a Motion for New Trial; Altering or Amending Judgment pursuant to Rule 59, SCRCP. This motion was denied.

This appeal is the result of the issuance of the Final Order.

A Notice of Intent to Appeal was filed and receipt acknowledged by the Court on July 28, 2020.

STANDARD OF REVIEW

" 'Our scope of review for a case heard by a [m]aster-in-[e]quity who enters a final judgment is the same as that for review of a case heard by a circuit court without a jury.' *Tiger, Inc. v. Fisher Agro, Inc.,* 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989). Actions seeking damages for breach of contract and actions for violation of the Payment of Wages Act are actions at law. *Mathis v. Brown & Brown of South Carolina, Inc.,* 389 S.C. 299, 698 S.E.2d 773 (S.C. 2010) See *McCall v. IKON*, 380 S.C. 649, 657, 670 S.E.2d 695, 700 (2008); *Ross v. Ligand Pharmaceuticals, Inc.,* 371 S.C. 464, 468, 639 S.E.2d 460, 462 (Ct.App.2006). In an action at law tried without a jury, the trial judge's findings have the force and effect of a jury verdict upon the issues and are conclusive on appeal when supported by competent evidence. See *Beheler v. Nat'l Grange Mut. Ins. Co.*, 252 S.C. 530, 535, 167 S.E.2d 436, 438 (1969). Accordingly, this Court's scope of review is limited to determining whether the findings are supported by competent evidence and correcting errors of law. See *Temple v. Tec-Fab, Inc.,* 381 S.C. 597, 600, 675 S.E.2d 414, 415 (2009).

ARGUMENTS

1. THE FACTS PRESENTED PROVE FRAUD ON THE PART OF THE APPELLANT AS TO THE VEHICLE CONTRACT.

"Fraud is an intentional perversion of truth for the purpose of inducing another in reliance upon it...". *Regions Bank v. Schmauch*, 582 S.E.2d 432, 354 S.C. 648, 672 (S.C. App. 2003). "In order to prove fraud, the following elements must be shown (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Id.* at 672.

The Appellant and the Respondent entered into an agreement for the purchase of the vehicles for the sum of $95,000.00. (T. p. 8, ll. 15-25) There is no disagreement that this was a representation made by the Appellant to the Respondent. Inclusive in this representation was that the Appellant had the ability to transfer ownership to the Respondent. The Respondent was to make payments over a period of time, although there were no set terms of payment.[1] (T. p. 11, ll. 13-21). Approximately 18 months after the agreement for the purchase of the vehicles and attachments, Respondent Duncan Jr., became suspicious that there may be a problem with the title because he had not seen the titles and Appellant could not produce them. (T. p. 72, ll. 4-17). Respondent further testified that there was a problem with one trailer because it had no title, and the other two titles were not in Appellant's name and he was only shown copies. (T. p. 74, ll. 12-25, p. 75, 4-19).

The Appellant testified that he had reported one of the trailers stolen but could not remember whether or not he ever got paid for the trailer from an insurance company. (T. p. 24,

[1] Appellant testified that he "thought he would pay...within about six months" (T. p. 10, ll. 22-24); he had an expectation that he would be paid in about three months or 90 days (T. p. 11, ll.22-25, p. 12, ll. 1-2)

ll. 15-22, p/ 28, ll. 1-12). The Appellant testified repeatedly that he was not aware that he received any funds from an insurance company for the trailer he reported stolen. (T. p. 28, 13-24). Despite the Appellant reporting the trailer stolen, he in fact did know what had happened to it. (T. p. 28, l. 25, p. 29-32). Appellant testified that he reported the vehicle stolen but he had actually brought it to a Flying J Truck Stop because it was supposed to be picked up by the repossession company. (T. p. 29, ll. 1-3). In regard to being questioned about whether the vehicle he reported stolen was the same vehicle he sold to Respondents; Appellant responded, "I'm not saying anything". (T. p. 29, ll. 19-22). The Appellant then testified that the trailer that was sold to the Respondents came from a "yard down in Chester County". (T. p. 30, ll. 3-6). When asked how he acquired it, he testified that "it just showed up" at the yard (T. p. 30, ll. 7-20). After further questioning regarding this matter, Appellant's testimony changes. He later testifies that the trailer that was in the yard in Chester County was the stolen trailer and is the same trailer that he sold. (T. p. 31, ll. 20-25; p. 32, ll. 1-3). Furthermore, Appellant never reported to the authorities that he had in fact recovered the stolen trailer. (T. p. 32, ll. 4-6).

Respondent's concern regarding title increased when he obtained a document from a service he uses in his business where he can obtain title information. (T. p. 115, ll. 20-25). This document was provided to Appellant during discovery and revealed that Sentry Insurance Company had title to the trailer. Appellant's counsel objected to the document being referred to as hearsay. However, Appellant's counsel opened the door when he asked Respondent whether he made any attempt to obtain title and whether he had a document with the VIN number of the trailer on it. (T. p. 91, ll. 14-25; p. 92, l. 1.) Counsel further asks whether or not we have the document. As soon as Respondent points to the document, Counsel indicated that it is hearsay

and cannot be referred to. After argument between counsel, the Court ruled that the door had been opened, although the document was not in evidence.

It is apparent that Appellant's testimony lacks credibility. The testimony clearly shows that Appellant either had knowledge that he was not able to transfer title to the vehicles he sold or a reckless disregard of this representation. Testimony reveals that he reported the vehicle stolen even when he knew that it was being repossessed, though he does not remember whether he received funds from Sentry Insurance Company, title to the trailer is in Sentry's name, he "found" the trailer at a yard that he frequents but does not know who owns the yard and he did not pay for the trailer to obtain it from the yard.

Appellant argues that he produced titles showing the owner as "Douglas Elizabeth dba Versatile Transport LLC dba" and thus this supports his position that he had title to the vehicles and could properly transfer them. There has not been any evidence that Appellant has any affiliation with Douglas Elizabeth or Versatile Transport LLC. The trial court ordered the Respondent to turn the trailer in question over to the Appellant within thirty (30) days and Respondent would be credited with the value of the trailer. (Record on Appeal, Order)

There is adequate credible evidence in the record that supports the trial court's finding that Appellant fraudulently represented himself. Appellant has not provided any title or evidence that supports his contention that he had ownership of the vehicles and could transfer them. Counsel for Appellant opened the door regarding the third-party document showing Sentry Insurance as the owner of the vehicles and therefore, testimony regarding this document is proper. Additionally, the trial court did not indicate that there was any reliance on this document in making her finding that Appellant fraudulently represented himself.

As a result of the foregoing, it is apparent that facts regarding Appellant's actions surrounding the sale of the vehicles prove fraud, thus the trial courts findings should be upheld.

2. THE CLAIM OF FRAUD IS NOT PRECLUDED BY WAIVER OR ESTOPPEL.

It is well-settled that an issue cannot be raised for the first time on appeal but must have been raised to **and** ruled upon by the trial court to be preserved for appellate review. *Staubes v. City of Folly Beach*, 529, S.E.2d 543, 339 S.C. 406 (S.C. 2000) (**emphasis added**). This requirement is intended " 'to enable the lower court to rule properly after it has considered all relevant facts, laws and arguments'." *Id.* 339 S.C. at 412 citing, *I'On v Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000).

Appellant indicates in his brief that "this defense to the Respondents' claim as to fraud was set out in the Appellant's Reply to the said Counterclaim". (Record on Appeal __, Reply to Counterclaim p.9. fn.1). However, this defense was not brought to the attention of the trial court nor did the trial court rule on the defense of waiver or estoppel. Thus, this issue is not properly before this Court.

In the event this Court determines that the issue is properly before this Court, the Respondent's claim of fraud is not precluded by waiver or estoppel. Appellant cites no authority to support his contention that the claim of fraud is precluded by waiver or estoppel. Respondent Duncan, Jr. did not testify that he discovered a problem regarding the title of the 2009 TrailKing trailer some 18 months after the vehicle contract was made. The Appellant is misinterpreting the testimony of the Respondent. The Respondent testified that he became concerned because he never saw the title and Appellant could not produce titles to the Respondent. (P. 72, ll. 1-17). Rather, Appellant would show him copies of titles for two of the vehicles (2002 Kenworth tractor and 1998 TrailKing trailer) and one registration. (T. p. 75, ll.

1-19). Respondent subsequently became concerned about the status of the vehicles and ran a program that he uses in the regular course of his business which indicated the true owner of the trailer in question, Sentry Insurance. (T. p. 91, ll. 14-23). Respondent Duncan Jr.'s continued payment of funds, regardless of their categorization, to the Appellant does not constitute waiver of their claim or an estoppel to advance.

Waiver is a voluntary and intentional abandonment or relinquishment of a known right. *Mac Papers, Inc., v. Genesis Press, Inc.,* 426 S.C. 393, 826 S.E.2d 874 (S.C. App. 2019) citing, *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992) "Waiver requires a party to have known of a right, and known that the party was abandoning that right". *Id.* 826 S.E.2d at 880 "Waiver is a question of fact for the finder of fact." *Id.* 426 S.C. at 404 citing, *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994).

The essential elements of estoppel related to the party claiming the estoppel is "lack of knowledge and of means of knowledge of truth as to the facts in question and reliance upon the conduct of the party being estopped as well as prejudicial change in position". *Id.*

In the case before this Court, Respondent did not voluntarily and intentionally abandon or relinquish any right. Respondent continued to pay for the property in reliance on the representation that title would be able to be conveyed. Additionally, Appellant did not lack any knowledge in this transaction or to any problems in the transaction as he was the party who needed to provide title. The conduct of the Respondent was continuing to make payment on vehicles that he began to become concerned Appellant could not be transferred. This conduct did not prejudice the Appellant in any way. In fact, the Appellant significantly benefited monetarily.

In conclusion, the issue of waiver is a question of fact for the finder of fact. This issue was not raised to the trial judge for her to rule upon. The claim of fraud is not precluded by waiver or estoppel and the trial court ruling in this case is proper.

3. THE EVIDENCE PRESENTED DOES NOT ALLOW THE APPELLANT TO A CLAIM OF UNPAID WAGES

The Payment of Wages Act, S.C. Code Ann. §41-10-80(c) provides "that when an employer fails to pay wages, an employee may recover 'an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow'." *Goodwyn v. Shadowstone Media, Inc.,* 408 S.C. 93, 757 S.E.2d 560, 563 (S.C. App. 2014). "An award of treble damages is appropriate when 'there [is] no good faith wage dispute' because 'an employer should not be penalized...for failure to pay wages upon an assertion of a valid defense to payment'." *Id.* citing *Rice v. Multimedia, Inc.,* 318 S.C. 95, 98-99, 456 S.E.2d 381, 383 (1995). It must be noted that §41-10-10 et seq. only governs payment of employee wages it does not embrace the earnings of independent contractors. *Adamson v. Marianne Fabrics, Inc.*, 301, S.C. 204, 391, SE.2d 249 (S.C. 1990). See also: *Sill v. Avsx Techs, LLC.,* 243 F.Supp.3d 664 (D.S.C. 2017).

First and foremost, Respondent testified that Appellant was not an employee of Respondent but rather an independent contractor. (T. p. 131, ll. 20-25, p.132., ll. 1-2). Respondent also testified that he had not furnished Appellant with any tax forms because they are still trying to figure out how much he got paid". (T. p. 132, ll. 3-9). All other employees at Respondent's business received W-2 forms because they were employees. (p. 131, ll. 17-23) As the result of Appellant not being an employee his claim for unpaid wages is not controlled by §41-10-10, et seq. Secondly, there is a dispute as to the amount of money the Appellant was earning weekly. Appellant testified that he was hired at the rate of $1,000.00 per week to drive a

truck for Respondent. (T. p. 14, ll. 14-16). He further testified that approximately four months into working he received a pay increase and was now earning $1,500.00 per week. (T. p. 14, ll. 20-23) Appellant prepared a chart of payments that was submitted to the trial court. (Record on Appeal __). At no point on the chart was there ever a payment reflecting $1,500.00. (T. p. 15, ll. 16-19). Respondent testified that there was never any agreement to increase Appellant's weekly earnings. (T. p. 104, ll. 2-25). Appellant's witness, Mr. Reiter, an employee of Respondent for 11 years, earned $1,600 per week which was a weekly rate and a per diem. (T. p. 104, ll. 6-13). The mere fact that one employee makes a certain amount of money is not indicative that another employee makes or is entitled to the same pay. Based upon the testimony of the parties, it is apparent that there was a good faith wage dispute and thus Appellant would not be entitled to the protection of §41-10-10, et seq.

Appellant also argues that the period that Appellant should be paid for is 115 weeks and asks this Court to take judicial notice that February 10, 2015 through April 15, 2015 constitutes 115 weeks. Although this may be a true statement, this is not the number of weeks applicable to determining the earning of Appellant. This argument is not supported by the evidence presented at trial. Appellant never argued or presented any evidence that he was entitled to payment of 115 weeks. The first time this was mentioned was in Appellant's brief, therefore any argument or calculation stemming from this assertion should be disregarded.

At trial, Appellant testified that his total amount of weeks worked was 94 weeks, based upon his own worksheet. (T. p. 21, ll. 4-12). During Appellant's testimony, the only thing he was contesting was the weekly payment amount, not that Respondent was claiming 91 weeks and he was claiming 115 weeks. (T. p. 22, 16-23) The Respondent agreed that either 91 or 94

weeks was the correct number of weeks. (T. p. 104, ll. 20-25).[2] The trial courts calculations are correct and thus all supplemental findings and conclusions are correct.

In regard to the assigning the payments to specific categories on Appellant's worksheet; he testified that the majority of the checks he received did not have any indication as to whether they were payments towards vehicles or wages. (T. p. 23). Appellant testified that because there was no indication what each payment was for (absent a few), he "kind of split it down the middle". (T. p. 23). It was an arbitrary assignment and did not accurately reflect the actual category of the payment. It is illogical for Appellant to take the position that because he arbitrarily decided that the payments should be assigned to equipment rather than owed wages, the court is bound by that decision. Respondent submits to this Court that the payments were split in this manner because unpaid wages may be entitled to treble damages.

The trial court did not err in finding that Appellant was not entitled to prevail in his claim for unpaid wages based upon the aforementioned arguments.

4. THERE IS CREDIBLE EVIDENCE TO ESTABLISH THE WORTH OF THE RETURNED THUNDERBIRD.

It is well-settled that an issue cannot be raised for the first time on appeal but must have been raised to **and** ruled upon by the trial court to be preserved for appellate review. *Staubes v. City of Folly Beach*, 529 S.E.2d 543, 339 S.C. 406 (S.C. 2000) (**emphasis added**). This requirement is intended " 'to enable the lower court to rule properly after it has considered all relevant facts, laws and arguments'." *Id.* 339 S.C. at 412 citing, *I'On v Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000). For the first time in Appellant's brief, he alleges that the Thunderbird was not worth $14,000.00. It was not argued at trial nor in Appellant's Rule 59, SCRCP Motion. This issue was not raised or ruled upon by the trial court.

[2] The total number of weeks reflected on Appellant's spreadsheet is 94 weeks, however, three weeks do not reflect any amounts earned (2/10/15, 2/20/15 and 5/5/15). Therefore, deducting these three weeks would be a total of 91 weeks.

In the event this Court determines this issue is properly before this Court, the testimony shows that the Appellant agreed to the value of the vehicle being $14,000.00 when he agreed to purchase it and use it as an offset towards the funds the Respondent owed the Appellant. (T. p. 34, ll. 10-12, p. 105, ll. 21-23). The envelope as it was referred to by the Appellant was provided in discovery to Appellant and there was never any objection regarding that document during the discovery process. (T. p. 39, ll. 16-19). There is no indication by either party that Appellant did not take possession of the vehicle. The parties also agree that the vehicle was returned to the Respondents by the Appellant. (T. p. 33, ll. 20-25, p. 105, 14-22) Appellant testified he returned the vehicle because it had a short in it. (T. p. 33, ll. 20-25). The Respondent, Duncan Jr., testified that he was unaware that Appellant was returning the vehicle and found out when they got back from being out of town. (T. p. 105, ll. 17-20).

The Appellant's argument that the value of the Thunderbird is not $14,000.00 is illogical. Both parties testified that the vehicle was sold to Appellant for $14,000.00.[3] Testimony indicates that the vehicle exchanged hands and for some period of time the Appellant had the use and enjoyment of the vehicle. (T. p. 33, ll. 20-25). The fact that the Appellant decided to return the vehicle does not eliminate the value of the vehicle at that time. Appellant further argues that "there must either be no contest on his part as to value or independent proof thereof". Appellant defeats his own argument when he testified that he entered into an agreement (that was put on an envelope) that he was to purchase the vehicle for $14,000.00. It is illogical to believe that he would purchase a vehicle if he did not believe that was the value of the vehicle or that he was not getting a good deal on the vehicle.

[3] There was no exchange of funds rather the money for the Thunderbird was to be deducted from the funds owed to Appellant from Respondents.

5. THERE IS CREDIBLE EVIDENCE OF THE DAMAGES FROM APPELLANT'S ATTEMPT AT REPOSSESSION.

The Appellant testified that he attempted to retrieve the truck from Respondent's property and that he only damaged a couple of locks. (T. p. 4, ll. 15-20). Appellant further testified that he went to the Respondent Duncan Jr.'s house with two other people to retrieve the truck. (T. p. 42, ll. 3-17). Appellant testified that another gentleman, Danny Soles, crawled through a broken window on the property. (T. p. 42, ll. 18-20). He later testified that "the window was already broken. We just crawled in it". (T. p. 43, ll. 18-25).

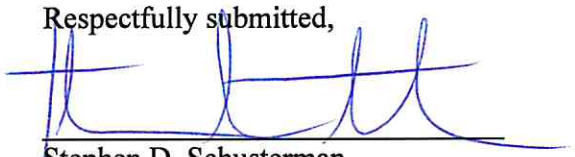
Respondent Duncan, Jr. testified that additional damage was done, other than just the lock. He testified that not only was the lock cut, but broke the window and they drove the truck out, tore the stacks off the truck, as well as other damage and damaged the garage. (T. p. 109, ll. 21-25; pp. 110-112). The Appellant and his accomplices were arrested outside of Respondents' property. (T. p. 113, ll. 3-14). Respondent, Duncan, Sr., testified that his Harley Davidson motorcycle got damaged when Appellant climbed through the window. (T. p. 139, ll. 22-25, p. 140, ll. 1-5). A document was entered from Custom Motorcycle Repair showing repairs in the amount of $4,195.00. Respondent testified that he paid this amount for the repair of the motorcycle. (p. 140, ll. 6-19). The Respondent only got credit for the damage that was done to the motorcycle not the garage door during the attempted repossession. (Record on Appeal p. ___) . The repair credit of $8,068.09 given to the Respondent was not for any repairs that were done during the attempted repossession, but rather for repairs done on Appellant's vehicle. (Record on Appeal p. __)

The testimony and evidence regarding the damage done to the motorcycle during the attempted repossession is credible and it was proper for the trial court to give the Respondents credit for this damage.

CONCLUSION

Based upon the aforementioned arguments, the Respondents seek an Order of this Court affirming the trial courts decision in its entirety.

Respectfully submitted,



Stephen D. Schusterman
SCHUSTERMAN LAW FIRM, PA
Attorney for Respondents
PO Box 4211
Rock Hill, SC 29732
Telephone: 803-325-7788
SC Bar No.: 11979

January 8, 2021