

THE STATE OF SOUTH CAROLINA

In the Supreme Court

Appellate Case No. 2017-000998

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S.C. SUPREME COURT

Appeal from Sumter County

R. Ferrell Cothran, Jr., Circuit Court Judge

Unpublished Opinion No. 2021-UP-009 (S.C. Ct. App. Jan. 13, 2021)

Paul Branco and Branco Investments, Inc.,

d/b/a Great American Cookie Co.,Petitioners

v.

Hull Storey Retail Group, LLC and Sumter Mall, LLC,Respondents.

PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242, SCACR, Petitioners Paul Branco and Branco Investments, Inc., d/b/a Great American Cookie Co., (hereafter “Branco” or “Petitioners”) file this Petition for a Writ of Certiorari to review the Court of Appeals’ decision in *Paul Branco and Branco Investments, Inc. d/b/a Great American Cookie Co. v. Hull Storey Retail Group, LLC and Sumter Mall, LLC* , 2021-UP-009 (S.C. Ct. App. filed January 13, 2021).

CERTIFICATE OF COUNSEL

Counsel certifies that the petition for rehearing was made and denied by the Court of Appeals on February 3, 2021.

QUESTIONS PRESENTED FOR REVIEW

I. Where there was evidence in the record that supported the existence of a contract and the Respondents’ tortious interference with same, did the Court of Appeals err in reversing the trial court’s judgment in favor of Branco?

- A. The Court of Appeals’ decision overlooks evidence in the record that supports the judgment, regardless of the existence of a contingency within the contract, and therefore the Court acted outside its limited scope of review.
- B. The Court of Appeals’ decision is in direct contradiction to the prevailing law of contractual interference in South Carolina.
- C. The Court of Appeals’ decision was the result of the Court improperly weighing the evidence in the case, substituting its view of one piece of evidence for that of the trial court’s view of all of the evidence presented at trial.

II. Where the defense of the Statute of Frauds was never raised or ruled upon by the trial court, did the Court of Appeals err in considering this argument?

STATEMENT OF THE CASE

Branco filed a complaint against Respondents on March 5, 2015. (R. pp. 17-26) alleging, among other causes of action, tortious interference with contractual relations. Respondents answered on April 14, 2015, admitting that the asset purchase agreement at issue was a valid contract. (R. p. 30 at ¶¶17-18; p. 37 at ¶¶17-18).

After approximately two years of discovery and motions practice, the matter proceeded to a two-day bench trial before the Honorable R. Ferrell Cothran, Jr. During the bench trial, Respondents made a motion for a “directed verdict” but failed to renew that motion at the close of the case. (R. pp. 235-238). At the conclusion of the trial, the trial court circulated a proposed order among counsel. Without waiting for the order to be reviewed, edited, signed, or entered, Respondents filed a Motion to Alter or Amend. (R. pp. 46-53). Two days later, the trial court filed its order, which took Respondents’ objections into consideration as it made certain changes to the order. (R. pp. 10-15). The order ruled in Respondents’ favor on many issues but ruled in favor of Branco on the claim of tortious interference with contractual relations, and awarding Branco \$63,625 in damages. (R. pp. 10-15).

Respondents did not renew their Motion to Alter or Amend or make a new Motion to Alter or Amend after the order was filed. Instead, Respondents filed a Notice of Appeal. Against the objections of Branco, Respondents subsequently moved the Court of Appeals to remand the case, without prejudice to refile the appeal, to allow the trial court to consider and rule upon the allegedly pending Motion to Alter or Amend. On August 28, 2017, the Court of Appeals granted the motion.

Judge Cothran held a hearing on February 9, 2018, and filed an Amended Order of Judgment on March 2, 2018. (R. pp. 290-318; pp. 1-9). The Amended Order reached the same

conclusions as the original order. (R. pp. 1-9). On January 13, 2021, the Court of Appeals issued its unpublished opinion, which reversed the judgment of the trial court.

STATEMENT OF THE FACTS

Petitioners owned and operated two (2) Great American Cookie Company (hereinafter “GAC”) franchises, one in the Sumter Mall and the other in the Magnolia Mall in Florence. (R. p. 21). Branco entered into a lease agreement (hereinafter “lease”) with Sumter Mall, LLC, a South Carolina LLC under the control and direction of Respondent Hull Storey Retail Group, LLC (hereinafter collectively “Hull Storey”), giving Branco a lease on Unit 55 in the Sumter Mall. (R. p. 21). The lease term was from December 30, 2002, to April 30, 2013. (R. pp. 319-338; p. 22). The lease agreement provided, in part, that “[i]f Tenant assigns its interest in this Lease, all consideration payable to Tenant in connection with such assignment shall be payable and belong to Landlord.” R. p. 331.

Sometime early in 2013, Branco Investments, Inc., the owner of the equipment and assets utilized in the Sumter Mall and Magnolia Mall GAC franchises, through Paul Branco, negotiated an asset sale agreement (hereinafter “Asset Purchase Agreement”) with Brooktenn, LLC (hereinafter “Brooktenn”), a limited liability company owned by Stewart Applebaum (hereinafter “Applebaum”). (R. p. 359). The Asset Purchase Agreement was executed on March 1, 2013. Brooktenn already owned and operated several GAC franchises in neighboring states. (R. p. 227, l. 12-14).

Pursuant to the Asset Purchase Agreement with Branco, Brooktenn submitted a lease application to Hull Storey, and Hull Storey approved Brooktenn’s lease to operate a GAC franchise in the Sumter Mall. The approved lease agreement between Hull Storey and Brooktenn was not signed. (R. pp. 154-155).

When Hull Storey became aware of Branco's deal with Brooktenn, it made a demand of \$70,000 for a "lease assignment fee" pursuant to the terms of the lease. (R. p. 155, l. 4-5, 13-20; p. 157, l. 14-18). Respondents knew and understood that Brooktenn was not taking an assignment of Branco's lease, but representatives from Respondents – specifically Hull Storey – nevertheless cited the assignment provision in the lease as a basis for the demand. (R. pp. 154 -157). Hull Storey eventually reduced its demand from \$70,000 to \$20,000. (R. pp. 366-372; p. 155, l. 4-5, 13-20; p. 157, l. 14-18).

Both Branco and Brooktenn were told by Hull Storey representatives that Brooktenn would not be allowed to operate a store in the Sumter Mall unless the \$20,000.00 was paid. (R. p. 129, l.23 - p. 131, l. 12; p. 157, l. 4-9; p. 160, l. 5-23; pp. 360-362; pp. 378-379). When both Branco and Brooktenn objected and pointed out that there was no lease assignment, Hull Storey then told Branco that the \$20,000 was instead an effort to recoup certain capital investments made in the Sumter Mall. (R. p. 129, l. 23-p. 131, l. 12; p. 157, l. 4-9; p. 160, l. 5-23; pp. 360-362; pp. 378-379).

Once it became clear Branco would not pay the \$20,000, Hull Storey turned to Brooktenn directly for the money. (R. p. 129, l. 23-p. 131, l. 12; p. 157, l. 4-9, p. 160, l. 5-23; pp. 360-362; pp. 378-379). Hull Storey representatives contacted Applebaum directly and suggested that Applebaum should break his Asset Purchase Agreement with Branco. (R. p. 129, l. 23-p. 131, l. 12; p. 157, l. 4-9; p. 160, l. 5-23; pp. 360-362; pp. 378-379). They even suggested to Applebaum that Brooktenn would come out \$50,000 "better" if it backed out of its deal with Branco. (R. p. 129, l. 23-p. 131, l. 12; p. 157, l. 4-9; p. 160, l. 5-23; pp. 360-362; pp. 378-379). Due to Respondents' conduct, Brooktenn withdrew from its purchase agreement with Branco and

abandoned its effort to operate a franchise in Sumter. (R. p. 129, l. 23-p. 131, l. 12; p. 157, l. 4-9; p. 160, l. 5-23; pp. 360-362; pp. 378-379).

Due to the interference by Respondents – notably Hull-Storey – with the Asset Purchase Agreement between Branco and Brooktenn, Branco lost the \$70,000 he would have received under the Asset Purchase Agreement. (R. p. 359; p. 197, l. 6-16; p. 227, l. 15-25). Branco was ultimately able to sell some of the store equipment for \$5,000. The trial court entered judgment in the amount of \$63,625, which reflected an offset of the amount received by Branco from the sale of equipment, plus unpaid rent owed to Hull -Storey in the amount of \$1,375. (R. p. 7.)

ARGUMENT

I. By Disregarding Evidence in the Record that Supports the Judgment, the Court of Appeals Erred in Reversing the Trial Court

Despite the well-defined standard of review, the Court of Appeals instead appears to have disregarded the existence of at least some evidence of a valid contract or, in the alternative, improperly weighed the evidence and decided which evidence (specifically, a contingency provision contained within the contract) was more important. In doing so, its opinion conflicts with the relevant case law and deviates from the standard of review.

On appeal from a bench trial, “the trial judge’s findings of fact will not be disturbed . . . if there is **any evidence** to reasonably support his findings.” *Meredith v. Mt. Pleasant Boat Bldg. Co.*, 286 S.C. 115, 333 S.E.2d 565 (1985) (emphasis added). “The trial court's findings are equivalent to a jury's findings in a law action.” *Hardaway Concrete v. Hall Contracting Corp.*, 647 S.E.2d 488, 374 S.C. 216 (S.C. App. 2007) (internal citations omitted). Thus, the Court’s standard of review extends only to correction of errors of law. *Hunt v. Forestry Comm’n.*, 358 S.C. 564, 595 S.E.2d 468 (2003); *See also Brown v. Dick Smith Nissan, Inc.*, 414 S.C. 101, 777 S.E.2d 208 (2015) (reinstating the trial judge’s decision where there was evidence in the record to

support the findings of fact and the Court of Appeals ignored such findings and substituted its own, thereby exceeding its standard of review); *See also Bass v. SC DSS*, 414 S.C. 558, 780 S.E.2d 252 (2015) (finding that “the Court of Appeals acted outside its limited scope of review” when, “rather than examining the record to discern whether there was any evidence put forward to support the jury verdict, the Court of Appeals seems to have searched the record for evidence to corroborate [the Defendant’s] theory of the case.”)

The Court’s opinion misapprehends the evidence in the record to support the trial court’s judgment; rather than reviewing the record to determine whether the low bar of “any evidence” to support the ruling was found, the Court appears to have focused solely on a supposedly unmet contingency in the asset purchase agreement, rather than the existence of the contract itself (which was admitted by the Respondents in their pleadings). *See, e.g., Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) (“It is well settled that parties are judicially bound by their pleadings The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings”) In short, the Court of Appeals overlooked the evidence in the record that supports the trial court’s finding that the asset purchase contract existed between Branco and BrookTenn.

Electing to focus on the “red herring” of the lease provision in the asset purchase agreement between Branco and BrookTenn – instead of on the evidence establishing the existence of the asset purchase agreement itself – the Court of Appeals improperly weighed the evidence. As a result, the Court of Appeals disregarded the “any evidence” standard and instead elected to ground its opinion on its view of the evidence; namely, that the asset purchase agreement executed by Branco and BrookTenn never existed because an alleged contingency contained therein was not met. This

ignores the fact that a valid contract was formed on March 1, 2013, regardless of whether it contained a contingency, as evidenced by the signatures of both parties thereto and the conduct of all involved. R. p. 359. Further, by its plain meaning, the contract was in effect for at least 90 days from the date of execution. The Court of Appeals further appears to ignore at least some evidence that the contingency contained in the asset purchase agreement was, in fact, satisfied, at least as testified to by Stewart Applebaum: “[w]e already had approval of the lease . . . [Hull Storey] already told us that we had a lease.” R. p. 155, l. 4-5.

Finally, the Court of Appeals disregarded the fact that the existence and validity of the asset purchase contract was acknowledged by the interfering parties in both their pleadings and through their words and conduct, to wit: Hull-Storey, when it learned of the asset purchase agreement, made demand upon Branco and BrookTenn for a “lease assignment fee” in the amount of \$70,000. R. pp. 363-365; pp. 366-372. If the asset purchase contract never existed, as the Court of Appeals asserts, then that necessarily begs the question – why would Hull-Storey assert it was owed additional monies as a result of the asset contract? R. pp. 155-157; pp. 366-372. Why would Hull-Storey contact BrookTenn and suggest it break its agreement with Branco? R. pp. 129-131; p. 157; p.160; pp. 360-362; pp. 378-379. Why would Respondents admit the contract existed in their pleadings?

“[W]hen the existence of a contract is disputed or its terms are ambiguous, evidence that a party complied with the terms of the alleged contract or acted in conformity therewith is relevant and admissible on the issues of the contract's existence, the meaning of its terms, and whether the contract was breached . . . A contract may arise from actual agreement of the parties manifested by words, oral or written, or by conduct.” *Conner v. City of Forest Acres*, 611 S.E.2d 905, 363 S.C. 460 (S.C. 2005) (internal citations omitted); *See also Rickborn v. Liberty Life Ins. Co.*, 321

S.C. 291, 303, 468 S.E.2d 292, 300 (1996) (contract may be based on verbal understanding to which both parties have mutually assented and upon which both are acting); *See also Gaskins v. Blue Cross-Blue Shield of S.C.*, 271 S.C. 101, 105, 245 S.E.2d 598, 600 (1978) ("agreement" does not necessarily import any direct or express stipulation, nor is it necessary that it should be in writing; if there is verbal understanding to which both parties have assented, and upon which both are acting, it is an agreement).

The Court of Appeals disregarded evidence in the record which supports the existence of a contract; further, it improperly substituted its view of the evidence from that of the trial judge, who was in the better position to evaluate the credibility of the witnesses. Taken together, there was at least some evidence to support the existence of a contract and Respondents' tortious interference with same.

A. The Court of Appeals' Reliance Upon *Chitwood v. McMillan* is Misplaced

The evidence in the case is that Branco decided not to renew its 10-year lease at the Sumter Mall and, instead, entered into an agreement to sell his assets to BrookTenn by way of a wholly separate asset purchase agreement, such contract containing certain performance requirements for BrookTenn. The Court of Appeals' reliance upon *Chitwood v. McMillan*, 189 S.C. 262, 1 S.E.2d 162 (1939) is thus in error, as the facts presented in *Chitwood* are wholly distinct from those presented by the instant case.

In *Chitwood*, a contract was entered into between SCDOT and Mr. Bowe for work to include, but not limited to, the removal of homes and structures from the right of way. Mr. Bowe subsequently entered into a subcontract with Chitwood to perform the removal work only and notified the SCDOT of same. SCDOT thereafter notified Mr. Bowe that it would not authorize Chitwood to work on the project and sent a letter advising of same. Chitwood thereafter brought

suit against SCDOT, asserting a claim for intentional interference with his subcontract. The Supreme Court, affirming the trial court's granting of a nonsuit in favor of SCDOT, found that Mr. Bowe was forbidden, pursuant to the terms of his contract with SCDOT, from entering into any subcontract without first obtaining written consent from SCDOT (which he failed to do).

Here, the expiring Lease Agreement contains no such prohibition against Branco entering into a contract to sell certain assets of his business (as well there would not be, as no business owner would agree to have their landlord dictate when or if the assets of his business could be sold) and the Asset Purchase Agreement was separate and distinct from the lease agreement. Accordingly, the Court of Appeals' reliance upon *Chitwood* is wholly inapposite, as *Chitwood* involved an underlying contract that contained express terms forbidding subcontracts without prior approval. Here, there was no subcontract, nor did the mall's lease contain any prohibition against the sale of the assets of a privately-held business.

Hull-Storey's sole involvement in the asset purchase transaction could have only occurred if Branco elected to try to assign or sublet the lease.¹ With no evidence in the record of any

¹ In fact, the record reflects that this case is not – and never was - about the enforcement of the assignment and subletting provision contained in section 16.1 of the Lease. R. p. 330. There is no evidence in the record that Branco elected to exercise his rights to assign or sublet under the Lease Agreement; indeed, Hull-Storey acknowledged as much in its briefing, admitting that Hull-Storey's demand for a lump sum payment was the result of its legitimate – but mistaken – view of a contractual right to a lease assignment payment, based upon its “perception” that the asset purchase agreement was an “end run” to attempt to avoid having to pay a lease assignment payment. Br. of App. at p. 17. Of course, this interfering conduct by Hull Storey is what ultimately led to the sale falling apart. BrookTenn's representative testified that he was never seeking or getting an assignment. R. p. 157. In fact, his testimony was that the first he heard of the assignment provision was when he received an email on April 30, 2013 from Hull-Storey. R. p. 154-155; R. pp. 366-372. It was for the trial court to weigh and consider the credibility of this testimony. *See, e.g., Okatie River v. Southeastern Site Prep*, 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2003) (“Credibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal.”)

attempt to assign and/or sublet the existing lease - and at least some evidence in the record that BrookTenn had an asset purchase contract with Branco and had separately entered into an agreement for a lease with Hull-Storey, the Court of Appeals substituted its view of the evidence for that of the trial court, by its finding that the asset purchase contract was essentially rendered void for failure by Brooke Tenn to obtain a lease. *See, e.g., Collins Entertainment Corp. v. Coats, et al.*, 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003) (affirming trial court’s finding that there was sufficient evidence of the existence of a contract even though the signatory differed, and further, the actions of the relevant parties served to ratify the contract).

II. The Court of Appeals’ Consideration of An Issue Not Raised and Ruled Upon by the Trial Court Was Error.

The Court of Appeals addressed an issue that the trial court did not address – namely, that because there was no written lease agreement entered into between BrookTenn and Hull-Storey, allegedly in violation of the Statute of Frauds, the underlying asset purchase agreement was a nullity. Because the trial record is devoid of any argument as to the Statute of Frauds – and Hull-Storey raised this argument for the first time in its post-trial motion for reconsideration – the Court should decline to consider this argument.

“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” *Atl. Coast Builders v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012) (internal citations omitted). In this case, the trial court never ruled on the merits of the statute of frauds defense and the Court of Appeals erred in doing so on appeal. *See, e.g., Semken v. Semken*, 379 S.C. 71, 664 S.E.2d 493 (Ct. App. 2008) (declining to address an additional sustaining ground because “it would be unfair to [Respondents] because this argument was not presented to the [lower]court”, [t]he parties never

mentioned or discussed” the argument made for the first time on appeal, and the court “may ignore any such arguments”); *See also Cowburn v. Leventis*, 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005) (declining to review an additional sustaining ground where “the issue was not argued to the trial court”).

CONCLUSION

Because the Court of Appeals’ opinion overlooks evidence in the record that supports a claim for tortious interference with contractual relations, the record is not devoid of evidence and *certiorari* is necessary to correct the error below. *See, e.g., Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 585 S.E.2d 272 (2003) (“the trial judge is concerned with the existence of evidence, not the weight of the evidence or the credibility of the witnesses”).

Rather than reviewing the record on appeal to determine whether the low bar of “any evidence” existed to support the trial court’s decision, the Court of Appeals’ opinion focused solely on a single clause within a contract, rather than the testimony and evidence as a whole. The Court of Appeals misapprehended the record before the trial court, and improperly weighed the evidence. Petitioners therefore request that this Court grant this Petition and issue a Writ of Certiorari to review the Court of Appeals’ decision in this case, order briefing, permit oral argument, and reverse the Court of Appeals’ decision and reinstate the judgment for all the reasons contained in the record.

Signature Page to Follow

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