THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APR 24 2013
S.C. Supreme Court

Carey Graham and Rodney A. Chardukian,

Respondents,

v.

Malcolm M. Babb, Brenda R. Babb, Cable Plus of Carolina, Inc., South Bay Lakes Cable Partnership, Southbridge Cable Television, LLC, and Renaissance Enterprises, Inc., now known as Condo Services, Inc., Defendants,

Of whom Brenda R. Babb and Renaissance Enterprises, Inc., now known as Condo Services, Inc., are the

Petitioners.

Appellate Case No. 2011-198607

Appeal From Horry County
R. Ferrell Cothran, Jr., Circuit Court Judge

Unpublished Opinion No. 2013-UP-037
Submitted December 4, 2012 – Filed February 6, 2013

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

COME NOW THE UNDERSIGNED, on behalf of the Petitioners, who would, pursuant to S.C.A.C.R. 242, petition this Court for a Writ of Certiorari. In support of this petition, Petitioners would show the following:

CERTIFICATE OF COUNSEL

Counsel for the Petitioners hereby certifies that a petition for rehearing or reinstatement was made and finally ruled on by the Court of Appeals on March 22, 2013.

William Isaac Diggs

This __________ day of April, 2013

QUESTIONS PRESENTED

I. Did the trial court commit error when it refused to allow the Appellants to testify at the trial on the issue of damages and punitive damages?

II. Did the trial court commit error when it neglected to give Appellants credit for signal costs from 2003 until 2007 when proffer made by Appellants showed that such costs totaled $194,602.50? and,

III. Did the trial court commit error when it awarded punitive damages in this case when such constituted double punishment, when Appellants had denied the allegations and had been placed in default with their meritorious defense stricken; and the punitive award was given to the corporate entities when they had neglected to protect their own interests?

IV. Did the trial court commit error when it allowed Respondents to act as receiver and to collect the judgment which had been entered against Appellant Babb?

STATEMENT OF THE CASE

Respondents filed this action on June 24, 2004 seeking an injunction, an accounting and damages for breach of contract relating to ownership rights and interests in certain cable television contracts. **R.105-113**. Petitioners timely filed an Answer generally denying the allegations made in the complaint and counterclaimed for Specific Performance of a contract. **R. 115-123**. The Respondents filed a Reply to the counterclaim dated September 2, 2004. **R. 126128**. Respondents thereafter served discovery requests. Petitioners answered the requests in a manner they considered correct and complete. However, Respondents objected to the adequacy of the responses and filed a Motion to Compel, and sought sanctions and other relief. The Honorable J. Michael Baxley, Judge, heard and granted the motion striking Petitioners responsive pleadings and counterclaim and holding them in default. **R. 36-48**. Petitioners filed a Motion to Reconsider which was denied by Judge Baxley.[1] Petitioners were placed in default pursuant to Rule 55, SCRCP.

On October 9, 2009, Respondents filed a Motion requesting the following: 1) a damages hearing; 2) the appointment of a receiver; and 3) a restraining order. **R 146-147**. A hearing on the motion was held on December 15, 2009, before the Honorable Clifton Newman, Judge. By Order filed March 16, 2010, Judge Newman approved the motion in part by allowing for a Receiver. **R. 6976**. The Court appointed John Pharr of Strand Development, Inc., Myrtle Beach, pursuant to Rule 66, SCRCP. Judge Newman denied the remainder of the motion. Mr. Pharr accepted the position of Receiver on April 28, 2010. Petitioners filed a Motion to Reconsider Judge Newman's Order on March 25, 2010, but Judge Newman denied the motion by Order filed March 30, 2010. Babb and Condo received written notice of Judge Newman's Order on April 15, 2010, and an appeal was taken on April 29, 2010. Judge Newman's order was affirmed.

The Honorable Benjamin H. Culbertson, Chief Administrative Judge for the Fifteenth Judicial Circuit then entered an order for the matter to be scheduled before the Honorable R. Ferrell Cothran, Jr., Judge for the purposes of establishing the damages to be awarded in this action. The matter came on for hearing before Judge Cothran on

[1] Judge Baxley's Order was appealed to the South Carolina Court of Appeals. However, that order was affirmed.

March 23, 2011, in Clarendon County, South Carolina. After hearing testimony in the matter Judge Cothran entered his *Judgment Against Defendants Brenda R. Babb and Renaissance Enterprises, Inc., Now Known as Condo Services, Inc.* on May 17, 2011. **R. 1-16**. This order allowed, *inter alia*, for judgment against the Petitioners jointly and severally, in the amount of Seven Hundred Seventy Six Thousand Six Hundred and Four and 55/100thes ($776,604.55) Dollars in actual damages for the period beginning on July 1, 2003 through June 30, 2010, plus punitive damages in the amount of Two Hundred Thousand and no/100 ($200,000.00) Dollars. **R. 11**. A Motion for Reconsideration was filed by on June 27, 2011. **R. 137**. Thereafter, Judge Cothran entered an *Amended Judgment Against Defendants Brenda R. Babb and Renaissance Enterprises, Inc., Now Known as Condo Services, Inc.* on August 1, 2011. **R. 20-32.** Petitioners' motion was denied on even date therewith, August 1, 2011. **R. 33-35.** The Amended order neither materially nor substantively altered the relief allowed for in the original order as against the Petitioners. An appeal was taken and the lower court was affirmed by the Court of Appeals by order entered February 6, 2013. A Petition for Rehearing was denied March 22, 2013.

Discussion/Argument

I. <u>The trial court committed error when it refused to allow the Appellants to testify at the trial on the issue of damages and punitive damages.</u> (Question I)

Appellants presented four arguments in the Court of Appeals in this case. The first question presented concerned the trial court's refusal to allow Petitioners, via Mrs. Babb, to testify at the damages hearing before the entry of actual and punitive damages, when the respondents' complaint had been unclear in its factual assertions and required that the trial Court delve into matters for clarification purposes. The question was framed as follows:

> Did the trial court commit error when it refused to allow the Appellants to testify at the trial on the issue of damages and punitive damages?

In response to this question, the Court of Appeals held the following:

> 1. We hold the trial court properly refused to allow Babb to testify at the damages hearing. A "defaulting defendant has conceded liability." *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978). Although "a defaulting defendant does not concede the [a]mount of liability," his or her participation in a damages hearing is limited to cross-examining witnesses and objecting to the plaintiff's evidence. *Id.* at 241-42, 246 S.E.2d at 882. Additionally, we hold the trial court was not required to consider Babb and REI's proffer of costs because their participation in the damages hearing was limited to cross-examining witnesses and objecting to Respondents' evidence.

See Order at page 2. In their Petition for Rehearing Petitioners argued that the Court of Appeals overlooked the portion of the argument which allowed the entry of *punitive* damages against the Petitioners in the amount of $200,000.00 while simultaneously denying them the opportunity to be heard at trial or to present a defense. Petitioners argued that this procedure amounted to the imposition of a criminal sanction against an accused while denying the accused the right to be heard. Petitioners argued that this process violates due process and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and due process of law and the right to be heard by a defendant as guaranteed the South Carolina State Constitution Art. I, Sections 3; and 14.

The Due Process Clause prohibits a State from punishing an individual without first providing that individual with "an opportunity to present every available defense." *Lindsey* v. *Normet*, 405 U. S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense." *American Surety Co.* v. *Baldwin*, 287

U.S. 156, 168 (1932). See also *Nickey* v. *Mississippi*, 292 U.S. 393, 396 (1934)). Appellants were denied that opportunity in this instance, we submit. The court should have either stricken respondents request for punitive damages, or allowed the petitioners to testify on that issue.

Moreover, South Carolina's procedure for allowing punitive damages in this case, calls into question the three areas of "fundamental" concerns expressed by the United States Supreme Court regarding the constitutionality of punitive awards in civil actions. "The fundamental due process concerns of this Court's pertinent cases [are] arbitrariness, uncertainty, and lack of notice." Philip Morris USA v. Williams, 549 U.S. 346, 354, 127 S.Ct. 1057 (2007), citing State Farm v. Campbell, 538 U. S. 408 at 416, 418; and BMW of NA, Inc. v. Gore, 517 U. S. 559 at 574.

The amount of punitive damages in this case are arbitrary and uncertain at minimum as being based on respondents' own lack of understanding as to the amount of their damages and the Court's lack of certainty with respect to any meritorious defense which could have been available to the Petitioners at trial. It is the height of arbitrariness we respectfully submit when punitive damages are based upon a default judgment which has been imposed by Court order as a sanction for discovery abuse. Moreover, while the default procedure used in this state may permit actual damages to be adjudicated neither our case law nor other jurisprudence precludes the introduction of evidence in defense of ***punitive damages*** based on ***alleged*** mis-conduct.

In *Howard v. Holiday Inns*, 271 S.C. 238, 246 S.E.2d 880 (1978), the Court discussed the procedure to be used in a default circumstance. Regarding the legal consequence of default, the Court stated,

> By defaulting, a defendant forfeits his "right to answer or otherwise plead to the complaint." 251 S.C. at 66, 160 S.E.2d at 193. [[2]] In essence, the defaulting defendant has conceded liability. However, a defaulting defendant does not concede the *amount* of liability.

Emphasis in original. The Court noted that there is one exception to this rule, that being, "When the action is one in contract for monetary damages and the demand is liquidated or, if un-liquidated, an itemized, verified statement of account is served with the summons and complaint." *Compare Beckmann Concrete Co. v. United Fire & Casualty*, 360 S.C. 127, 600 S.E.2d 76 (Ct. App. 2004) (The mere demand for judgment of a specified dollar amount does not suffice to make plaintiff's claim one for "a sum certain" as contemplated by Rule 55(b))."

S.C.R.C.P. Rule 55 (b) governs the procedure to be followed when default has been entered. It states in part,

> If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages ***or to establish the truth of any averment by evidence or to make an investigation of any other matter,*** the court may conduct such hearing or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties if a proper demand therefor has been made pursuant to Rule 38 and not withdrawn, or when and as required by any statute. Pursuant to Rule 5(a), notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail to the last known address of such party whether or not such party has appeared in the action.

Emphasis added. In this case, Respondents' complaint clearly shows that the amount of damages is not known. Judge Baxley's order itself (which struck Appellants' responsive pleading) called the damages hearing a "trial." See Order at page 13. While the order

[2] *Morgan's, Inc. v. Surinam Lumber Corp.* 251 S.C. 61, 66, 160 S.E.2d 191, 193 (1968).

does state that, "The allegations of Plaintiffs Complaint and the Plaintiffs' Requests for Admission shall be deemed admitted by the Defendants Brenda Babb and Condo Services[,]" the complaint alleges only

> (6) "That ... the individual owners of the corporate and partnership Defendants (the Plaintiffs and the Defendants Babb) met with officials of Time Warner Cable for the purposes of attempting to establish a new agreement for providing cable services to the areas serviced by their common provider agreements. At that meeting, ***these individuals agreed in the presence of Time Warner that the Defendants Babb would pay unto the Plaintiffs substantial sums based upon an agreed formula, for their portion of the revenue stream from the cable provider agreements, provided that the agreement be reduced to writing.*** Pursuant to such oral understanding, the cable service bulk provider, Time Warner, executed an agreement with the Defendants Babb and Renaissance Enterprises, also known as Condo Services, Inc, a South Carolina corporation, which is upon information and belief, owned and controlled by the Defendants Malcolm M. Babb and Brenda Babb.
>
> (7) That as a result, the defendants Babb and the corporations under their control have billed and collected the revenues from the service areas heretofore mentioned, but have failed to make any payments whatsoever to the Plaintiffs or to the legal entities that own the rights to the provider agreements. Despite repeated demands, the Defendants Babb and the corporations under their control have failed and refused to execute a written agreement concerning the purchase of the service agreement and payment of funds to the Plaintiffs or the entities owning the service provider agreement.
>
> (8). "That immediately after such meeting, the Plaintiffs submitted a written agreement to the defendants Babb for execution as agreed earlier, but since such time, the Defendants Babb and the corporation under their control, have refused mail addressed to their address and have refused to return the Plaintiffs' repeated telephone calls

> concerning finalization of the transaction and payment of the income stream from the service agreement, whether to the individual owners or to the entities that own the service agreements.

R. 106 - 108. Thus, while the allegations are deemed admitted, for example, that the Plaintiffs submitted a written agreement to the defendants Babb for execution as agreed earlier, the ***truthfulness of the agreements accuracy remained unsettled in this litigation at the time of trial.***

This is so because the complaint merely states that "a written agreement to the defendants Babb for execution as agreed earlier." The complaint alleges that the act of execution had been agreed upon, but it does not allege that the written agreement accurately encompassed the terms of the oral understanding or that it reflected the meeting of the minds which had occurred at the Time Warner offices, if any, had indeed occurred. **R. 217, line 12 – 220, line 9.** Appellants were required to accept as true that a written agreement was submitted as agreed, but we were left to question whether the agreement was accurate. See *Duncan v. Duncan*, 93 S.C. 487, 76 S.E. 1099 (1913) ("...the default admits the truth of every relevant fact ***well pleaded***."). Emphasis added. But in this case, the complaint did not allege that the agreement accurately recounted the terms of the "oral agreement" which was allegedly made in the presence of Time Warner representatives; and the sanctions order did not so state. **R. 36 – R. 48.**

An inquiry into truthfulness is specifically allowed for by S.C.R.C.P. 55(b) and such an inquiry was not foreclosed by Judge Baxley's order imposing sanctions. S.C.R.C.P. 55(b) requires specific findings regarding damages. See *Hermanson v. Szafarowicz*, 457 Mass. 39, 927 N.E.2d 982 (2010), and cases cited therein interpreting the federal rule 55. And findings on this point were required due to questions left unanswered by the complaint itself. While the Court made specific findings it did so without allowing the defendants to introduce evidence on that point. As discussed below, the damages would have been impacted to a significant degree.

Moreover, the Respondents testified and acknowledged at trial that there was no agreement. See **R. 251, lines 12-13** where everyone agrees that there was no agreement as a result of the 2003 meeting between the parties at the Time Warner offices in 2003. This is significant we submit given that Respondents admitted they did nothing further to protect the interests of the community residents regarding the delivery of cable services to the consumers. Respondent Graham admitted he doesn't know why his company didn't enter into an agreement with Time Warner for continued signal for the consumers, **R. 288, line 5**; they did not have a contingency plan if the Babbs did not want to buy out their interests, **R. 293, lines 1-16;** he never made a complaint to Time Warner about its dealing with Mrs. Babb, **R. 297, lines 4-8;** and he never did anything to determine whether the signal even continued or not. **R. 299, lines 6-17.** Only Appellants could have provided testimony explaining the inaction of Respondents on these points left ambiguous by the complaint. Further it is essential to know these matters when the question of punitive damages arises, as discussed infra.

II.

<u>The Court of Appeals committed error when it overruled Respondents questions II Y & III in the direct appeal</u>. (Questions II and III).

Petitioners also submitted the following questions in their appeal with respect to the way actual damages were computed in this case and the way in which that inflated number was used in the computation or justification of punitive damages. Petitioners presented the following questions:

> II. Did the trial court commit error when it neglected to give Appellants credit for signal costs from 2003 until 2007

when proffer made by Appellants showed that such costs totaled $194,602.50? and,

III. Did the trial court commit error when it awarded punitive damages in this case when such constituted double punishment, when Appellants had denied the allegations and had been placed in default with their meritorious defense stricken; and the punitive award was given to the corporate entities when they had neglected to protect their own interests?

In ruling against the Appellants on these issues, the Court of Appeals held:

> 2. We hold the award of punitive damages was supported by the evidence and was not excessive. "Punitive damages are recoverable in conversion cases if the defendant's acts have been willful, reckless, and/or committed with conscious s indifference to the rights of others." *Mackela v. Bentley*, 365 S.C. 44, 49, 614 S.E.2d 648, 651 (Ct. App. 2005). When evaluating whether an award of punitive damages violates due process, this court conducts a de novo review. *Jenkins v. Few*, 391 S.C. 209, 221, 705 S.E.2d 457, 463 (Ct. App. 2010), *cert. granted* February 13, 2012. A court conducting a post-judgment review of punitive damages must consider the degree of reprehensibility of the defendant's conduct, the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award, and the difference between the punitive damages award and the civil penalties imposed in comparable cases. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 585, 686 S.E.2d 176, 184 (2009). ***We hold sufficient evidence of reprehensible conduct exists to support the punitive damages award without considering Babb and REI's discovery abuse.*** Although the harm was economic rather than physical, the harm involved repeated incidents over nearly seven years. The complaint alleged Babb evaded Respondents' efforts to reduce an oral agreement to writing, and Babb and REI collected revenue without making payments to the entities that owned the cable rights. This mistake was not accidental because Babb and REI were aware as early as June 24, 2004, when the complaint was filed, that Respondents were claiming an interest in the money collected. Additionally, we hold the disparity between the actual damages award and the punitive damages award is not unreasonable or excessive. The punitive damages award of $200,000.00 is less than the actual damages award of $776,604.44; accordingly, the ratio is .26, which does not exceed a single-digit ratio. *See id.* at 588, 686 S.E.2d at 185 ("[T]he Supreme Court has . . . consistently declined to adopt a bright line ratio or simple mathematical test . . . [but] few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." (internal quotation marks omitted)). Given the length of the litigation and the fact that Babb and REI continued to convert funds belonging to the entities for more than six years, we hold

> an award of some type was necessary to deter similar conduct in the future. Furthermore, the award was reasonably related to the harm, and Babb has the ability to pay, as evidenced by her affidavit stating she has assets valued at over $1,000,000.00 with no financial liabilities or obligations. *See id.* ("[A] court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay."). Finally, a review of other cases awarding punitive damages in conversion actions shows the punitive damages awarded here are not excessive. *See Mackela*, 365 S.C. at 46, 49, 614 S.E.2d at 649, 651 (affirming an award of $50,000.00 in punitive damages for conversion when the actual damages were only $13,320.23).

Opinion at pages 2 - 3. Emphasis added. With all due respect, there was a meritorious defense in this case which was stricken in this case and the factual allegations made by Respondents undermined the credibility of respondents' assertions of "reprehensible conduct." Thus, the evidence of "reprehensible conduct," apart from the discovery abuse(s), is potentially a fictional account of Mrs. Babbs' conduct which is built upon only one side of an evidentiary story without allowing Mrs. Babb to testify about the context of actual actions taken by her and why.

That the Court order imposed default as a sanction against the Petitioners does not change the fact that the respondents abandoned the business and walked out of negotiations with Time Warner. The public then being served by the cable franchises would have received no future service, and in effect, the affected communities would have "gone dark" but for Mrs. Babbs' efforts to prevent that end result.[3] Only after she successfully saved the business did the respondents return with their hands out. Even if the Petitioners were held in default, we respectfully submit, respondents were not entitled

[3] Respondents had stated they were not going to invest any more money in this business and Time Warner had stated they were not going to do further business with Respondents under such circumstances. Thus Mrs. Babb had no option other than to do what was done in this matter.

to a revision of history and then to base punitive damages on a defendant based on that revisionist story.[4]

Notwithstanding the discovery sanction of default, Petitioners paid bills during the operation of the business as argued in the Brief of Appellant at Argument II, pages 15 – 17. The trial court's sanction of holding them in default, then failing to give them credit for legitimate costs of doing business from 2003 until 2007, does three things adverse to the Petitioners' financial interests: (1) it deprives the petitioners of their right to pursue a breach of contract claim against the respondents as was initially pled by them in their responsive pleading; (2) it allowed for a default judgment to be entered against them containing inflated damages due to the Trial Court's refusal to acknowledge $194,602.50 in costs which were paid by Petitioners during their operation of the cable business during the times at issue; and (3) allowed for punitive damages to be based upon an inflated figure of actual damages, without which inflation, the punitive award would be necessarily reduced.

Certiorari should properly be granted to review this aspect of Petitioners' case and to reverse the award of punitive damages.

III.

The trial court committed error when it allowed Respondents to act as receiver and to collect the judgment which had been entered against Appellant Babb? (Question IV).

Petitioners also argued on appeal that it was error to allow Respondent, Graham, to act as the receiver in this case and to allow him to apply income due Mrs. Babb from

[4] It is cruel and unusual indeed to cite "reprehensible conduct" when that conduct is based on conclusory allegations contained within a pleading and the defendant is denied the right to respond to the allegations due to "discovery abuse(s)" which were wholly unrelated and apart from the alleged tortuous conduct.

her ownership interests in this case to the damages award granted against her in lieu of utilizing statutory remedies available to judgment creditors. Appellants presented the following question:

> IV. Did the trial court commit error when it allowed Respondents to act as receiver and to collect the judgment which had been entered against Appellant Babb?

In responding to this question, the Court of Appeals held

> 3 We hold the trial court did not err in appointing Graham as receiver. The order appointing an independent party as a receiver was a temporary order; accordingly, it was not law of the case. *See G-H Ins. Agency, Inc. v. Travelers Ins. Cos.*, 270 S.C. 147, 173, 241 S.E.2d 534, 546 (1978) ("[A court] considering a new case on the merits is not bound by decisions on legal issues made by a [court] considering the case on application for a temporary injunction."). Furthermore, we hold the trial court did not err in providing that Graham could apply any funds due to Babb against the judgment.

Petitioners would respectfully submit that the respondents should not be allowed to collect the monies received by the corporate entities and then apply Mrs. Babbs' portion of monies received to the judgments. Such a process allows for abuse and mistakes and is done without the judicial oversight which the legislature intended in the areas of debtors rights and creditors remedies.

CONCLUSION

WHEREFORE, Petitioners would respectfully submit that the above matters be reviewed and the petition for writ of certiorari be granted and the lower courts reversed on the forgoing issues.

Respectfully submitted,

Brenda R. Babb

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This 22nd day of April, 2013
Myrtle Beach, South Carolina

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In The Supreme Court

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S.C. Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge
Case No. 2004-CP-26-3498

Carey Graham and Rodney A. Chardukian

Respondent,

v.

Malcolm M. Babb, Brenda R. Babb, Cable Plus of Carolina, Inc., South Bay Lakes Cable Partnership, Southbridge Cable Television, LLC, Renaissance Enterprises, Inc., Now Known as Condo Services, Inc.,

Defendants,

Of Whom

Brenda R. Babb and Renaissance Enterprises, Inc, Now Known as Condo Services, Inc., are

Appellants,

CERTIFICATE OF SERVICE

This is to certify that I have this 22nd day of April, 2013, deposited one copy of the **PETITION FOR WRIT OF CERTIORARI** in the U.S. Postal Service with proper postage affixed thereto and addressed to opposing counsel as follows:

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Brenda R. Babb

Brenda R. Babb