

THE STATE OF SOUTH CAROLINA
In the Supreme Court
Appellate Case No. 2013-000860

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S.C. Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 2013-UP-037 (S.C. Ct. App. Feb. 6, 2013)

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.,

of whom,

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

Petitioners.

RETURN TO PETITIONERS' PETITION FOR CERTIORARI

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The Respondents hereby submit, pursuant to Rule 242 of the South Carolina Appellate Court Rules, their Reply to the Petitioners Petition for Writ of Certiorari as follows:

QUESTIONS PRESENTED

1. Did the Trial Court err when it failed to allow Petitioner Babb to testify at a default damages hearing when such witness had refused to provide information on damages issues during discovery and she had been declared in default because of such refusal? (Petitioners' Questions I and II)
2. Did the Trial Court err when it awarded punitive damages against the Petitioners in a default damages hearing when they converted assets of the Respondents to their own use? (Petitioners' Question III)
3. Did the Trial Court err when the Receiver appointed was discharged after judgment was rendered against the Petitioners? (Petitioners Question IV)

STATEMENT OF THE CASE

The Respondents filed this derivative action on June 24, 2004 when the Petitioners converted corporate properties and assets of the Defendants to their own use. After repeated discovery abuses, Judge J. Michael Baxley declared the Petitioners in default, their Answer and Counterclaims were stricken, the allegations of the Respondents' Complaint were deemed admitted, and the matter was ordered to be heard as a default damages hearing. Petitioners' appeal of these issues to the Court of Appeals was unsuccessful. The matter was heard before the Honorable R. Ferrell Cothran on March 23, 2011 as a default damages hearing.

The named Defendants own cable television lines, equipment and rights covering 784 customers in Horry County. Since the late 1980's, the Defendants contracted with Time Warner Cable ("TWC") to provide the cable services. The Defendants earned 10-12,000.00 per month from the sale of the signal through 2003, which was paid to and

distributed by Graham to the owners (R.270). Petitioner Brenda Babb is the sole owner of Petitioner Renaissance Enterprises, Inc. Babb is a 50% shareholder in Defendant Cable Plus and a 50% owner/member in Defendant Southbridge Cable. The Respondents own the balance of the ownership interests in the Defendants. Graham is the President of Cable Plus and the manager of Southbridge, and exclusively handled the finances for the Defendant entities prior to July, 2003.

In July 2003, Babb unlawfully converted the cable rights of the Defendants to her own use when she executed a new "Residential Services Provider Agreement" in the name of Petitioner Renaissance with TWC for an 84 month period. Pursuant to the terms of that 84 month Agreement, Petitioner Renaissance billed and collected the income from the sale of the cable signal to the 784 customers of the Defendants and paid TWC a monthly fee to provide the service.

The Respondents initiated this derivative action on behalf of the Defendants for actual and punitive damages sustained by the Defendants as a result of the Petitioners converting the Defendants' rights and property to their own use. The Respondents sought an accounting from the Petitioners of the receipts and expenses of the business to establish the actual damages sustained. The Petitioners refused, despite Court orders, to provide any financial records of cable business to the Respondents, before and after being declared in default.

Petitioners refused to account for any income and receipts from the business for the first 44 months of operations, when they billed the customers for the services. Because of a default in payment by Petitioners to TWC, TWC billed and collected all the revenues for the last forty (40) months of the Agreement. The Respondents submitted

into evidence, without objection, the actual income and expenses of operations during the 40 months that TWC collected the income and paid the expenses. The Respondents submitted into evidence a deposition from the Petitioners' expert witness, without objection, which established the expense that Petitioners would have incurred if they operated the business during these months. The Respondents then established the average monthly income and expense during this forty month period of operations and multiplied this monthly figure times 84, the number of months of operation, to establish actual damages.

Judge Clifton Newman ordered Babb to appear at her deposition held a month before the damages hearing, where she refused to answer any financial questions concerning the income, expenses and accounts of Petitioners during the first forty four months of operation. At the damages hearing, the Petitioner Babb attempted to cross-examine the Respondents concerning written documents (Courts Exhibit proffer-R. 526-28, 535-538) she had prepared that was never disclosed in discovery and had never been seen by Respondents. The Lower Court sustained the Respondents objection that Babb could not cross-examine the witness about a document the witness did not prepare and had not seen. There was no challenge by Petitioners to any financial information presented to the Court by the Respondents. The Lower Court refused to allow Babb to testify concerning the costs of operations during these 44 months because she was in default and she refused to provide these facts during discovery and in her deposition the month before.

On May 17, 2011, the Lower Court granted Judgment against the Petitioners, jointly and severally, in the amount of \$776,604.55 in actual damages, together with

punitive damages in the amount of \$200,000.00. The Lower Court directed that the punitive damages award in the amount of \$200,000.00 on the conversion cause of action would not be shared with Babb, in her capacity as a shareholder/member/partner of the Defendants, as Babb's wrongful acts were the cause of the award being granted. The Court approved payment of the attorney's fees and expenses incurred by the Respondents on behalf of the Defendants, a Court appointed Receiver was discharged, and the Court directed that all future cable payments would be paid to Respondent Graham on behalf of the Defendants, with specific instructions as to accounting and disbursements. The Court directed that the Babb would receive no disbursement from the Defendants unless and until the judgment was satisfied. The Respondent Graham has opened a bank account and has continued to deposit and disburse the funds as required by the Lower Court's order.

The Petitioners filed their Motion to Reconsider with the Lower Court on June 27, 2011, which was denied on August 1, 2011. The Petitioners' appeal to the Court of Appeals was denied in February 6, 2013. Petitioners' Petition for Rehearing was denied on March 22, 2013.

The Respondents initially sought the appointment of a Receiver and a temporary restraining order when the action was filed. Judge Thomas Cooper denied the request of the Respondents based upon a financial statement letter (T. 206-208) submitted under seal. Babb convinced Judge Cooper that she had ample resources to satisfy any monetary judgment awarded by the Court in this action. Respondents were later successful in getting a Receiver appointed, principally to get authority for a Receiver to renew the cable services agreement with TWC. Judge Newman approved the new Agreement and Petitioners were unsuccessful in their appeal of this issue to the Court of Appeals in their

second appeal. In his Judgment, Judge Cothran, with the concurrence with Judge Newman, found no future need for a Receiver, and the Receiver made his final accounting, and he was paid and discharged. The new Agreement with TWC required TWC to pay the Defendants a monthly fee for use of its equipment and lines, which was approved by the Court. Because of the contentious nature of the Petitioners, Judge Cothran directed that all future revenues from TWC under the new provider agreement would be paid to Respondent Graham, with specific instructions as to how the monies would be deposited and disbursed. Respondent Graham has opened an account in the name of the Defendants and has complied with the Court's Order. The Court directed that Babb would not receive any disbursements from Graham until she satisfied the judgment against her. Three days after the damages hearing, the Petitioner Babb signed an agreement to transfer the two real properties contained in the financial statement provided to Judge Cooper to her brother, who had never seen the properties. This resulted in another action by the Respondents against the Petitioner Babb's brother to set aside the transfers as fraudulent transfers. The Respondents were successful in setting aside the fraudulent transfers, with another appeal expected.

ARGUMENTS

1. The Lower Court did not abuse its discretion in refusing to allow Petitioner Babb to testify at the default damages hearing.

In this derivative action, the Respondents established that the Petitioners took and converted the assets of the Defendants for their own use, which consisted of revenue generated by Defendants' cable television system located near Myrtle Beach. The Petitioners were declared in default and the allegations of the Complaint were deemed admitted when they refused to produce any financial information concerning the

operations of these businesses during the 84 months they controlled the business. After an unsuccessful appeal of the sanctions order, Judge Newman ordered that Petitioner Babb appear for her deposition, scheduled jointly with the Petitioners' companion case against Time Warner. In that deposition held in February 2011, Babb refused to answer questions concerning the income during this period or where the business accounts were located and she testified that she had not reported any of the income on federal and state income tax returns. Babb defiantly stated in that deposition in response to a question from Respondents' attorney DuRant as to what bank accounts the revenues were placed:

I have been placed in default for not providing the financial information on the exact things you are asking me now. And because I was placed in default, there will be a damages hearing on March 23. I did not provide that information. Judge Baxley saw fit to place me in default because I didn't answer it. I didn't answer it then and I'm not going to answer it now.let's put it that way. But I'm not going to give you—I was placed in default for not giving you that information and I'm not going to give it to you now.I do not care to divulge it at this time. You received the ultimate sanction of having my answer and counterclaim struck.... for the same reason; for not providing that information. And I'm not going to provide it now.

DuRant: Ms. Babb, do you stand by your statement that you refuse to answer any questions concerning what bank account you made the deposits?

Answer: Yes, sir, I do.

When asked whether the monies were still in the account, she replied:

I think I'm going to stand by my previous answer that our answer and counterclaim was struck for not providing information to your clients regards banks, bank accounts, amount of money in the bank accounts. I'm going to stand by my previous answer regarding any of REI's finances. (See Deposition Babb, T. 368-72)

At the damages hearing, the Respondents established the estimated net income collected by the Petitioners from the operations of the cable system for the seven year

period. The Petitioners used these same financial records to establish the amount of their claim against TWC in its separate litigation, which TWC and Petitioners stipulated to the Court as being correct. The Respondents used the same data from a 40 month period to establish an average net monthly income, which was multiplied by 84 to establish estimated damages or profits collected by Petitioners during the term of the Agreement. The Lower Court properly refused to permit the Petitioners to cross-examine the Respondents concerning written documents prepared by Babb that the Respondents had never seen and could not self authenticate (T. 526-28, 535-38). A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. The Respondents had no personal knowledge of the Petitioners' income during the first 44 months of the Agreement and it was improper for Babb to cross-examine Respondents upon this issue, once this lack of knowledge was established. See Rule 602, South Carolina Rules of Evidence.

Respondents had no knowledge of the actual financial affairs during the period of the Agreement because Petitioners repeatedly refused to provide that information to them in discovery. That was why the Respondents were declared in default. Graham testified that the Defendants earned \$10-12,000.00 per month for prior periods of operations. The Lower Court stated verbally that the Petitioners had no right to present their own "independent" evidence of damages or earnings, which had not been disclosed in discovery. It is well settled that by being in default, the Defendants are deemed to have admitted the truth of Respondents' allegations and to have conceded liability. Howard v. Holiday Inn Inc., 271 S.C. 238, 246 S.E.2nd 880 (1978); Schenk v. National Health Care, Inc., 322 S.C. 316, 471 S.E.2d. 736 (Ct. App. 1996). Though a defaulting party may be

entitled to notice of the damages hearing, that Defendant is limited to cross-examining witnesses and objecting to evidence. Ammons v. Hood, 288 S.C. 276, 341 S.E.2d 816 (Ct.App. 1986). The Petitioners did not object to the Respondents' evidence of damages and the Petitioners did not cross-examine or otherwise challenge the Respondents on how the damages were calculated.

The Petitioners refused to produce evidence of actual income and receipts from operations during discovery. Direct evidence of damages in this case would have been the actual income received and the expenses incurred by the Petitioners during the period they operated the business, evidence that the Respondents could have verified in the accounting requested in the Complaint. The Lower Court did not limit the cross-examination of the Petitioners as to the amount of damages or how the damages were calculated, but properly sustained Respondents' objection that the Petitioners could not cross-examine Respondents concerning a document that the witness did not prepare and had not seen and that could not be authenticated.

Pro-se Babb attempted to introduce evidence of income and expenses she allegedly incurred during these operations, which she refused to disclose and produce in discovery, including a Court ordered deposition the month before the damages hearing. These "alleged" expenses were not given to her expert witness Strait, for the purposes of his expert opinion concerning the expenses of operation. Petitioners now assert it was legal error to prohibit the Petitioner Babb from testifying to different costs of operation, facts that she refused to disclose in discovery and in her deposition. It would have been shocking if the Lower Court had allowed this self produced "exhibit" to be used for any

purposes at the damages hearing as it is contrary to the information given by Babb to her own expert in the TWC case on this same issue.

The only evidence relevant at the damages hearing was how much money the Petitioners collected or should have collected during the 84 month period minus the cost of the cable signal and operational expenses. The Petitioners refused to provide any information during discovery concerning these issues and the Court rightfully held Petitioners could not testify or introduce new undisclosed evidence on these issues.

When the Petitioners were declared in default, the Lower Court heard the Respondents' claims based upon the theory of accounting principles, civil conspiracy, and "conversion," an intentional tort. The Petitioners acted in concert in this civil conspiracy. Condo was the alter ego of Babb. The actual damages awarded to the Respondents are equal to the profits earned by the Defendants during the 84 month period. The Lower Court had already held that the Petitioners had no legal right to receive any funds from the operations of the cable system. The Petitioners refused to account for the revenues to the Court. The standard of review is whether there is any evidence to reasonably support the factual findings of the Trial Court. Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). The Lower Court saw and heard the witnesses and was in a better position to judge their creditability, and the reviewing Court is not required to ignore these findings. Inlet Harbour v. S.C. Department of Parks, Recreation & Tourism, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). Petitioners argue somehow that the Respondents had a duty to prove that the operating income belonged to the Defendants. It is undisputed in the record that the cable television easements and rights were owned by the Defendants and there is no evidence

in the record that the Petitioners ever had a legal right to contract those rights for their own benefit.

In “Argument II,” the Petitioners allege that the Lower Court erred in not giving Petitioners credit for signal costs paid from 2003 through 2007, when “proffer made by Petitioners showed that such costs totaled \$194,602.50.” The damages profile utilized by the Respondents allows credit for payment to TWC for 84 months for the signal at an average monthly charge determined during a 40 month period, an amount greater than the amount alleged paid by the Petitioners. The Respondents submit that a certified public accountant could have determined what the Petitioners’ income, expenses and profits were during this period, if the Petitioners had provided the actual data that was substantiated. The Agreement required Petitioners to make a monthly payment to TWC for the signal and Petitioner Renaissance was sued by TWC when it failed to make such payments. In discovery and at her deposition, the Petitioners refused to disclose what was paid TWC for the first 44 months of operations. In fact, Petitioners disputed this amount in its trial with TWC. Without evidence of gross income and expenses, it was impossible to establish what the actual net income of Condo during this period. Babb testified that she did not report the income on state and federal tax returns. (See Deposition of Babb, T. 348-353). The Respondents’ computation of average net monthly income reflects an average monthly debit for payment made to TWC for signal over this 40 month period. Condo does not get to deduct these expenses twice. The actual damages sustained were proved by competent and unchallenged evidence of income received and expenses incurred. When the Petitioners refused Court orders to provide actual records of income and receipts from operations, Petitioners forced the Respondents to establish damages by

other acceptable methods. The Lower Court properly precluded the Petitioners from attempting to introduce such records in the damages hearing.

II. The Lower Court properly awarded punitive damages against the Petitioners for their shocking and willful acts (Argument III).

The Lower Court awarded \$200,000.00 in punitive damages against each of the Petitioners after an exhaustive examination of the Petitioners' conduct. The award of punitive damages is subject to review by this Court pursuant to the factors established in Gamble v. Stevenson, 305 S.C. 104, 112, 406 S.E.2d 350, 355 (1991), and BMW v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.ed.2d 809 (1996), commonly referred to as the Gamble and Gore factors. The Lower Court made specific findings according to those standards. The misconduct occurred before and during the litigation. Babb is employed by the Court as a Court Reporter and deliberately used dilatory and deceptive practices during the proceedings to prevent justice from occurring. She ignored Court Orders. Petitioners were placed in default because of misconduct in this case and there was a deliberate attempt to conceal the truth from the Court and the Respondents. This finding of default does not excuse the Petitioners' behavior as the monies misappropriated did not belong to Petitioners, but were corporate assets of the Defendants. Babb had a fiduciary duty to account for the misappropriated funds. She argues before this Court that she should be able to hide this information during discovery and it was legal error not to let her use this information in a damages hearing when she has been declared in default. An award of punitive damages is hardly a "double" punishment. The punitive damage award was not designed solely to punish the Petitioners for discovery abuses, but was designed to deter the Petitioners and others from misappropriating corporate assets in the future and for using fraudulent and deceptive methods in litigation to conceal these

actions. Babb still does not get the message—the monies and rights misappropriated did not belong to her and thus could not be given to her “alter ego” company Renaissance. When Petitioner Babb’s actions were determined to be unlawful, she had a legal and a fiduciary duty to account for the funds. Babb’s deceptive conduct in this litigation is shocking, as she continued to collect misappropriated funds as the litigation continued. In the context of the amount of punitive damages, as discussed in Mitchell vs. Fortas, 385 S.C. 570, 686 S.E.2d 176 (S.C. 2009), the award of \$200,000.00 in punitive damages was only 26% of the actual damages awarded, well under published guidelines that permit a multiple greater than actual damages. Judge Cothran discussed the shocking behavior of the Petitioners in this action in his written Order. Petitioners misappropriated \$776,000.00 from the Defendants over a seven year period while this action was pending and denied under oath that they received the monies. After Petitioners were declared in default, they still defiantly refused to account for the funds or the location of the funds. The Petitioners entered into a course of conduct designed to frustrate legitimate Court adopted rules and Orders, which were designed to ensure fairness to all parties. Petitioners offer no apology or remorse for her actions, even at this stage of the appellate process. As a Court Reporter employed by the South Carolina Court Administration, Babb ignored the rules of practice of this Court and disobeyed Court Orders to further her illegal means. In Mitchell, supra, the Court discussed the defendants’ “improper litigation conduct,” which can be considered as a factor if it results in an attempt by the Petitioners to conceal the truth. Babb’s conduct in this litigation was one of the many factors properly considered by the Court in the determination of the punitive damages award.

The financial statement of the Petitioner Babb was submitted to the Lower Court, at the time of the first Receivership request, as evidence of Petitioner Babb's ability to pay the damages that could be awarded. (See Financial Statement, T. 206-08). After the decision of the Lower Court was announced, but before signing and filing of the Order, Petitioner Babb transferred the real property listed on her financial statement to her brother, necessitating another legal action by the Respondent. Petitioner Babb is fully capable of paying the award, which is only 26% of the award of actual damages and materially less than what the Defendants will have to pay to third parties to collect the award. Punitive damages should be awarded to punish unlawful conduct and to deter its repetition upon the theory that the "punishment should fit the crime." The conduct was reprehensible; and the award was only 26% of actual damages, which is well within the "ratios" approved in earlier cases. See Mitchell, *supra*, at page 188. Finally, the Lower Court specifically determined that Babb, as a shareholder/member, should not share in the punitive damage award, as she should not be rewarded for her substantial misconduct. The award of punitive damages was justified and reasonable under the circumstances.

The Petitioners now argue that they have been able to present a "full defense" since punitive damages were awarded. Respondents were required to prove to the satisfaction of the Court that they were entitled to punitive damages. The Petitioners committed an intentional tort when they converted the Defendants assets to their own use. The Petitioners refused to tell the Court or the Respondents how much or what they took and defiantly claim they should be able to testify concerning these matters because punitive damages may be awarded. Punitive damages were pled and requested in the Complaint and Petitioners had knowledge of this when they deliberately defied Court

orders. The Respondents did not know the amount of actual damages when the action was filed, as the damages continued each month. The Respondents damages were an amount equal to the lost profits or income from the operations of the business, facts known by the Petitioners. The Respondents were required to submit proof of damages and they sought actual income and expenses from the Petitioners. The Petitioners refused to produce this evidence. The Respondents produced convincing evidence to the Court of the actual damages sustained. Petitioners made a deliberate decision not to provide the actual income and disbursements and cannot complain of the consequences of their actions.

III. The Lower Court properly appointed and discharged the Receiver in this action.

The Lower Court, on the Respondents' second application, appointed John Pharr as Receiver, with specific authority to collect monies and enter new provider agreements. Receiver Pharr, with the assistance of Respondents, successfully entered into a new agreement with TWC, where the Defendants will receive a monthly payment for many years. The Receiver was requested by the Respondents initially to keep the Petitioners from receiving and diverting the assets of the Defendants during the pendency of this action. This request was denied by Judge Cooper. The Respondents' second request was to have the Court appoint a Receiver to renew the provider agreement with TWC. Petitioners did not object to the appointment of Pharr, but unsuccessfully appealed the Order. Receiver Pharr completed his duties and made his final Report to the Court that appointed him. The Receiver had not collected any monies at that time. The Court found no necessity for a Receiver in the future. Receiver Pharr made his final accounting and

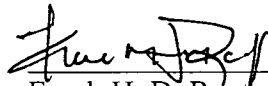
was paid and discharged. The Court made specific instructions concerning how Graham, as agent and officer for the Defendants, was to receive and disburse all funds of the Defendants, as he had done for many years in the past. As the Receiver has made his final report and has been discharged, the argument to continue the Receivership is moot.

Babb now complains that the Court erred when it directed Graham not to pay any disbursements to Babb unless and until Babb had satisfied the judgment the Defendants held against her. The Order was appropriate as the entire purpose of the civil action was to recover money misappropriated by Petitioners from the Defendants. This argument is manifestly without merit and deserves no further argument.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should deny the Petitioners Petition and tax costs against the Petitioners.

Respectfully submitted,



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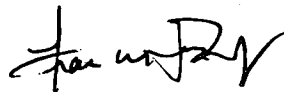
Petitioners.

CERTIFICATE OF SERVICE

This is to certify that have this 6th day of May, 2013, place a copy of the Respondents Return to Petitioners Petition for Writ of Certiorari in the United States Mail, postage prepaid and addressed to opposing counsel as follows:

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