OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 41

October 30, 2006
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charles W. Huggins, Jr., as Personal Representative of the Estate of Charles Walter Huggins, III, Appellant,

v.

Sheriff James R. Metts, in his official capacity as Sheriff of Lexington County, Respondent.

Appeal From Lexington County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 4168
Heard October 10, 2006 – Filed October 23, 2006

AFFIRMED

William Gary White, III, of Columbia, for Appellant.

William H. Davidson II and Andrew F. Lindemann, both of Columbia, for Respondent.

SHORT, J.: Charles Huggins, Jr. (Huggins), as personal representative of the estate of Charles Huggins, III (Deceased), appeals the trial court's decision granting summary judgment in favor of Sheriff James Metts. Huggins contends the trial court erred in holding that his federal and state claims were identical and in holding the federal court decided his state issues. We affirm.

FACTS

On July 19, 2001, the Lexington County Sheriff's Department (the Police) responded to a call from Huggins stating Deceased was threatening to burn down several homes and to commit suicide. Police did not find Deceased at his home but with the use of bloodhounds, found him in the woods behind his residence. When the Police approached Deceased, they observed that he was armed with two large butcher knives. Police ordered Deceased to drop the knives, but he did not and stated to them that they were going to have to kill him.

The Police brought in a negotiator to attempt to speak with Deceased, however, he was not receptive to speaking with the negotiator. After a period of time, the Police radioed for a taser to subdue Deceased, but upon hearing this, Deceased stated "you're not going to tase me." Deceased indicated that he was "going home" and began walking towards his residence. The Police attempted to keep themselves between Deceased and the residence and continued to demand that Deceased drop the knives. When Deceased continued to advance towards one of the officers, he was told "do not come any closer or I will shoot." Deceased, still armed with two large butcher knives, continued to approach the officer, and once he got to within fifteen feet, the officer discharged his weapon and shot Deceased. After being shot, Deceased continued toward the officer at which point two other officers shot Deceased. Deceased died as a result of his gunshot injuries.

In July of 2002, Huggins filed suit in federal court alleging the Police violated Deceased's Fourth Amendment rights on the basis that they used unreasonable force in fatally shooting Deceased. Huggins also included

supplemental state law claims in this action. The Federal District Court granted summary judgment in favor of the Police regarding the federal claims, but declined to take jurisdiction over the state claims and dismissed them without prejudice. The district court's decision was subsequently affirmed by the United States Court of Appeals for the Fourth Circuit.

On March 25, 2005, the state claims were heard in circuit court. The circuit court granted summary judgment in favor of the Police based on the determination that the federal court decisions barred Huggins's claim under the doctrines of res judicata, collateral estoppel, and/or issue preclusion. Further, the circuit court found that Huggins's claim also failed under the Police's argument of self-defense. This appeal followed.

STANDARD OF REVIEW

"In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56, SCRCP." Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005) (citing Trousdell v. Cannon, 351 S.C. 636, 639, 572 S.E.2d 264, 265 (2002)). The judgment may be affirmed only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP. The reviewing court must consider the facts and inferences in the light most favorable to the nonmoving party. Estate of Cantrell by Cantrell v. Green, 302 S.C. 557, 559, 397 S.E.2d 777, 778 (Ct. App. 1990).

LAW/ANALYSIS

I. Sovereign Immunity

Huggins contends the circuit court erred in determining that his federal and state claims were identical and that the federal court's determinations were dispositive of his state claims. Huggins argues the federal court addressed only the reasonableness of the Police actions at the time immediately prior to Deceased's shooting and that the state claim alleges

negligence in the time frame leading up to the moment preceding the shooting. We need not reach these issues in the disposition of this matter.

The South Carolina Tort Claims Act (the Act) is "the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b)."[1] S.C. Code Ann. § 15-78-20(b) (Supp. 2005). The Act waives sovereign immunity "while also providing specific, enumerated exceptions limiting the liability of the state and its political subdivisions in certain circumstances." Wells v. City of Lynchburg, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct. App. 1998). One such exception to the waiver of immunity is found in section 15-78-60(6) of the South Carolina Code (Supp. 2005) which states: "The governmental entity is not liable for a loss resulting from: (6) civil disobedience, riot, insurrection, or rebellion or the failure to provide the method of providing police or fire protection."[2]

Huggins argued before the circuit court that unlike the federal claim, this state claim was about the preparation and events leading up to the time immediately preceding the shooting of Deceased. This action concerns the manner in which the police chose to provide police protection. Because the Act specifically exempts the Police from liability concerning the methods which they choose to utilize to provide police protection, we need not address Huggins's other claims. Even were we to accept all of Huggins's assertions as true, it would not remove the immunity which the legislature has bestowed

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[1] Section 15-78-70(b) states an employee of a governmental entity is not granted immunity from suit by this chapter if the employee's conduct was not within the scope of his official duties, constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.

[2] This court has previously held this statute contains a scrivener's error. The conjunctive "or" is missing. Therefore, the statute is properly read as the governmental entity is not liable for the failure to provide **or** the method of providing police or fire protection. (See Wells v. City of Lynchburg, 331 S.C. 296, 304, 501 S.E.2d 746, 750 (Ct. App. 1998)).

on the Police in this situation. We find no genuine issues of material fact, and, therefore, we affirm the circuit court's granting of summary judgment.[3]

CONCLUSION

We find no error in the circuit court's granting of summary judgment. Based on the foregoing, the circuit court's order is

AFFIRMED.

ANDERSON, J., and HUFF, J., concur.

[3] Although the argument regarding immunity under the Tort Claims Act was not decided by the circuit court, this court "may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

William Rhett Snowdon, Appellant.

Appeal From Pickens County
Larry R. Patterson, Circuit Court Judge

Opinion No. 4169
Submitted September 1, 2006 – Filed October 23, 2006

AFFIRMED

Acting Chief Attorney Joseph L. Savitz, III, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Deborah R.J. Shupe, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

STILWELL, J.: William Snowdon appeals the trial court's denial of his motion to suppress the introduction of marijuana discovered on his person during a search incident to his arrest. We affirm.[1]

FACTS

Local police received a complaint of a disturbance at Snowdon's home. When the officers arrived at the scene, Snowdon was standing in his front yard "grossly intoxicated." He was arrested for breach of the peace. During a search incident to the arrest, the officer discovered a small quantity of marijuana in Snowdon's wallet. Snowdon was charged with breach of the peace and possession of marijuana.

Snowdon subsequently pled guilty to breach of the peace in magistrate court. Thereafter, and while he was on trial in circuit court for the marijuana charge, Snowdon sought to suppress introduction of the marijuana, arguing that it was the fruit of a search following an illegal arrest made without probable cause. The trial court determined Snowdon's guilty plea in magistrate court precluded him from contesting the legality of his arrest and, a fortiori, the search incident thereto. Snowdon was convicted of possession of marijuana and sentenced to one year in prison.

STANDARD OF REVIEW

The admission or exclusion of evidence is a matter addressed to the trial court's sound discretion. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). The court's ruling will not be disturbed unless a manifest abuse of discretion and probable prejudice are evident. Id. An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Wallace, 364 S.C. 130, 135, 611 S.E.2d 322, 335 (Ct. App. 2005).

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

LAW/ANALYSIS

Generally, a knowing and voluntary guilty plea waives all non-jurisdictional defects and defenses, including claims of constitutional violations. Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975). "A defendant who pleads guilty usually may not later raise independent claims of constitutional violations." Gibson v. State, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

Snowdon does not contend that his guilty plea to breach of the peace was involuntary, nor does he assert that the search itself was otherwise improper. He relies solely on the contention that the officer's warrantless arrest for breach of the peace was without probable cause and therefore violated his constitutional rights. Continuing, he reasons the unconstitutional arrest made the search that was incident thereto improper, thereby requiring suppression of any evidence obtained as a result. This contention is without merit. Having pled guilty to breach of peace, Snowdon has waived any objection he may have had, and cannot, therefore, assert constitutionally based violations attendant to his initial arrest and the legal consequences flowing therefrom.

In addition, Snowdon is collaterally estopped from relitigating the issue of the validity of his arrest.[2] "Collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action." Koon v. State, 358 S.C. 359, 364-365, 595 S.E.2d 456, 459 (2004) (overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)) (citing Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003)). Because Snowdon pled guilty to breach of the peace, the issue of whether there was probable cause to arrest him for that offense was necessarily determined in the magistrate court proceeding.

[2] Collateral estoppel can be used in a criminal proceeding. See State v. Brown, 201 S.C. 417, 424, 23 S.E.2d 381, 383 (1942) (holding that defendant was estopped from relitigating the value of stolen goods in magistrate court where circuit court determined value and remanded to magistrate court based on that determination).

Consequently, the doctrine of collateral estoppel prevents Snowdon from raising that issue again at his trial for possession of marijuana.

For all of the foregoing reasons, the decision of the trial court is

AFFIRMED.

HEARN, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Temple Ligon, Appellant,

v.

Jeff Norris and Affinity Technology Group, Inc., Respondents.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 4170
Heard September 14, 2006 – Filed October 30, 2006

AFFIRMED IN PART AND REVERSED IN PART

William C. Cleveland and Thomas P. Guerard, both of Charleston, for Appellant.

Jacquelyn Lee Bartley, Robert L. Widener and Jane W. Trinkley, all of Columbia and Mark P. Henriques, of Charlotte, North Carolina, for Respondents.

STILWELL, J.: John Temple Ligon filed this breach of contract action against Jeff Norris and Affinity Technology Group, Inc., seeking over $5 million in damages. A jury awarded Ligon $382,148. Based on the jury's

response to post-verdict interrogatories, the trial court set aside the verdict and entered judgment for the defendants. Ligon appeals. We reinstate the verdict.

FACTUAL BACKGROUND

In 1993, Ligon and Norris were classmates at Duke University's business school. Norris approached Ligon and numerous other students and faculty members, explaining his idea for an automated teller machine that would bypass lengthy loan processes and immediately dispense proceeds of a loan.

Ligon had many contacts with potential investors in his home town of Columbia, South Carolina. During a telephone conversation in June of 1993, in exchange for Ligon's assistance in raising capital, Norris allegedly offered Ligon a one percent interest in a startup company to be created to develop the concept.

Ligon introduced Norris to numerous influential people. Although none of them ultimately invested in the company, they assisted Norris in securing a lender, provided free office space, and introduced Norris to other potential investors. Dick Bannon, a contact provided by Ligon, served as chief financial officer and advised Norris on how to structure the company.

In November 1993, Norris started the company as U.S. Loan, Inc. Ligon and Bannon became members of the board of directors. In January of 1994, based on Bannon's advice, U.S. Loan was dissolved and Affinity Financial Group, Inc. was incorporated in Delaware.

In March or April of 1994, Norris asked both Bannon and Ligon to leave Affinity. According to Ligon, Norris assured Ligon his one percent interest in the company was secure. Later that year, during a telephone conversation between Norris and Ligon, Ligon became concerned that Norris would not honor the oral contract. Ligon therefore sent a letter to Duke University offering half of his one percent interest in Affinity in exchange for relief from a tuition debt. By letter dated September 21, 1994, Norris

informed Duke that Ligon had no interest in Affinity. Norris sent a copy of the letter to Ligon.

During the ensuing two years, restricted shares of stock in the company were issued to various Affinity employees including Norris. Affinity offered common shares to the public on April 26, 1996. The parties later stipulated that a one percent interest at that time was worth $5,468,881. Ligon did not receive any stock from Norris or Affinity and consequently filed this action.

The matter was tried before a jury in July of 1998. The jury rendered verdicts in favor of Ligon against Affinity for $48,000 and against Norris for $20,000. The trial court granted Ligon a new trial absolute. On appeal, this court affirmed in an unpublished opinion.

During a pre-trial motions hearing at the second trial, Ligon argued he was proceeding on an 'all or nothing' theory of recovery, asking for damages of $5,468,881, the value of one percent of the stock at the time of public issuance. He accordingly moved to exclude any evidence of stock valuations at any other time. The court granted the motion. During the trial, however, the jury saw and heard both evidence and arguments regarding stock values to which Ligon may have been entitled at times other than the date of the initial public offering. After lengthy discussion at a charge conference, the trial court decided, without objection from either party, to submit a general verdict form rather than special interrogatories for the jury's consideration. The jury returned a verdict in favor of Ligon for $382,148. Thereafter, and once again following extensive discussion and consultation, the trial court submitted special interrogatories to the jury to assist the court in ruling on post-trial motions. The jury answered the interrogatories finding a contract had been breached, but Ligon was not entitled to a one percent interest in the company at the time of the initial public offering.

Ligon moved, inter alia, for judgment notwithstanding the verdict (jnov), new trial nisi additur, or new trial absolute. The defendants moved for entry of judgment in conformance with the special interrogatories, jnov, or new trial absolute. The trial court set aside the verdict and entered judgment for the defendants.

ISSUES ON APPEAL

Ligon raises four issues on appeal, asserting 1) the trial court erred in denying his motion for jnov; 2) the trial court erred in denying his motion for new trial nisi additur based on the jury's responses to the special interrogatories; 3) the verdict and responses to special interrogatories are irreconcilable, thereby entitling Ligon to a new trial absolute; and 4) the trial court erred in entering judgment in favor of the defendants and should reinstate the monetary verdict.

LAW/ANALYSIS

JNOV

Ligon argues the trial court erred in denying his motion for jnov. Ligon asserts the only "legally valid amount of damage" is $5,463,881. We disagree.

In ruling on a motion for jnov, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. The motion should be denied where either the evidence yields more than one inference or its inference is in doubt. The trial court can only be reversed when there is no evidence to support the ruling. McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006).

Ligon claimed entitlement to valuation of one percent of the company as of the date of the public stock offering. Although a preliminary business plan mentioned common stock at the time of the initial public offering, there is evidence of other valuation dates and methods in the record including the prospectus and testimony. Ligon's own testimony was inconsistent regarding the manner and time of valuation. Ligon admitted the parties did not discuss when the stock would be valued. Ligon acknowledged his ownership share "could go any number of ways, which was not discussed" at the time of the formation of the contract. Ligon testified he was entitled to the same amount Peter Wilson received. According to the prospectus, entered into evidence by Ligon, Wilson and other early investors and employees acquired stock as early as October of 1994, more than a year before the initial public offering.

Finally, Norris testified, without contemporaneous objection, that Ligon's alleged one percent interest would have been diluted by subsequent investors.

Thus, regardless of the trial court's rulings excluding evidence of any valuation time or manner other than as common stock at the time of the initial public offering, the jury heard evidence of other valuation times and methods. Furthermore, despite the court's ruling prohibiting the defendants from arguing alternate valuations in closing, Affinity argued, without objection from Ligon, that "Ligon expected to get stock at the date of the first venture capital . . . in July of 1994" and that numerous others in like circumstances received restricted stock rather than the common stock issued at the initial public offering."[1] Also without objection, the charge to the jury on the subject of damages was the classic general law of damages applicable to a breach of contract action, and excluded any reference to the stipulated value of one percent of the company at the time of the initial public offering. Finally, the stipulation itself stated the value of one percent of the company on the date of the public offering but did not state that an award of damages was limited to that value. While there was considerable discussion among the attorneys and the trial court about the "all or nothing" theory of recovery, none of the discussion was held while the jury was present. Thus, the jury was not privy to Ligon's "all or nothing" demand.

The jury apparently determined the valuation of Ligon's interest in the company should have been calculated at a time other than the date of the initial public offering or for an amount other than the stipulated value. As there was evidence in the record to support such a finding, the trial court did not err in denying Ligon's motion for jnov.

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[1] Ligon argues error arising from Affinity's closing argument. However, Ligon failed to timely object to the closing argument. When a party fails to make a timely objection to an improper closing argument, the issue is not preserved for appellate review. Varnadore v. Nationwide Mut. Ins. Co., 289 S.C. 155, 159, 345 S.E.2d 711, 714 (1986).

ADDITUR

Ligon also argues the trial court erred in denying his motion for new trial nisi additur in reliance on the jury's responses to the special interrogatories. We disagree.

After the jury rendered its general verdict of $382,148, the court submitted the following special interrogatories to the jury, and received the indicated responses:

> Question 1: In reaching your verdict, do you unanimously find that a contract was formed between the Plaintiff and the Defendants?
> X Yes
> ___ No
>
> Question 2: If you answered yes to Question 1, do you unanimously find that the contract was for Plaintiff to receive 1% of Affinity Technology at the time of the initial public offering?
> ___ Yes
> X No

Ligon first asserts the issuance of special interrogatories to the jury after it rendered a general verdict constituted error. Ligon also argues the interrogatories were confusing because a negative response to either question could be interpreted in more than one way. Ligon asserts the jury's response to the second question could indicate either the jury was not unanimous in its verdict, or the jury did not find the contract was for one percent at the time of the initial public offering.

We find Ligon failed to preserve the issue of the trial court's submission of the interrogatories after the general verdict was returned.[2] Although Ligon initially objected to the submission of interrogatories, the

[2] As the issue is not preserved, we make no ruling on the propriety of this unusual procedure.

trial court and the parties' attorneys discussed the issue and Ligon eventually stated: "I withdraw my objection. I think that's the appropriate way to go." An objection withdrawn at trial constitutes an express waiver of the issue and does not preserve the issue for appellate review. Rosamond Enters., Inc. v. McGranahan, 278 S.C. 512, 513, 299 S.E.2d 337, 338 (1983); 75 Am.Jur.2d Trial § 422 (1991).

Ligon also argues the interrogatories are flawed because they include the term "unanimously," and a negative answer to either question could be interpreted as an answer regarding unanimity or an answer regarding the ultimate question. We find the interrogatories were not so confusing as to necessitate reversal on this issue.

Interrogatories must be considered in conjunction with the jury instructions. Fortune v. Gibson, 304 S.C. 279, 282, 403 S.E.2d 674, 675 (Ct. App. 1991). During general charges to the jury, the trial court instructed that the verdict must be unanimous. Again when the special interrogatories were submitted to the jury, the court instructed the jury to answer "collectively and unanimously." When considered with the jury instructions, we find no prejudice to Ligon based on the wording of the interrogatories. See State v. Myers, 344 S.C. 532, 536, 544 S.E.2d 851, 853 (Ct. App. 2001) (affirming where "clear and cogent jury instructions ameliorated any possible prejudice" stemming from interrogatories).

Finally, Ligon argues the trial court erred in denying additur based solely on the answers to the interrogatories rather than based on the evidence at trial. Even if the trial court erred in relying on the interrogatories, there is evidence in the record to support the trial court's decision to deny additur.

The trial court has the power to grant a new trial nisi additur when it finds the amount of the verdict to be merely inadequate. O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993). The denial of a motion for a new trial nisi additur is within the trial judge's discretion and will not be reversed on appeal absent an abuse of discretion. Id. The consideration of a motion for a new trial nisi additur requires the court to consider the adequacy of the verdict in light of the evidence presented. Waring v. Johnson, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000). A trial court does not abuse

its discretion in denying a motion for new trial nisi additur where there is evidence in the record to support the jury's verdict. See Steele v. Dillard, 327 S.C. 340, 345, 486 S.E.2d 278, 281 (Ct. App. 1997) (finding no abuse of discretion where the evidence in the record supports the amount of the jury award even though other evidence in the record indicated the jury could have awarded a larger verdict).

As discussed in addressing the trial court's denial of Ligon's motion for jnov, we find evidence in the record to support the jury's verdict. Accordingly, we find no error in the trial court's denial of Ligon's motion for new trial nisi additur.

NEW TRIAL ABSOLUTE

Ligon next argues the trial court should have granted him a new trial absolute based on the allegedly flawed interrogatories. We disagree. The trial court may grant a new trial absolute if the judge believes the verdict is not supported by the evidence. Folkens v. Hunt, 300 S.C. 251, 254, 387 S.E.2d 265, 267-68 (1990). The grant or denial of new trial motions rests within the discretion of the trial judge and will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. Vinson v. Hartley, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996). As previously noted, we find evidence in the record to support the jury's verdict and further find no reversible error in the manner in which the interrogatories were worded. Accordingly, the trial court did not abuse its discretion in denying Ligon's motion for new trial absolute.

ENTRY OF JUDGMENT FOR DEFENDANTS

Ligon finally argues the trial court erred in granting the defendants' motion for entry of judgment in conformance with the special interrogatories. We agree.

When considering a motion for entry of judgment notwithstanding the verdict, the trial judge cannot disturb the factual findings of a jury unless the record discloses no evidence supporting those findings. Force v. Richland

Mem'l Hosp., 322 S.C. 283, 284, 471 S.E.2d 714, 715 (Ct. App. 1996). If more than one reasonable inference exists, the jury verdict must stand. Id.

The trial court found the answers to the special interrogatories were consistent with each other but inconsistent with the general verdict, finding no competent evidence of damages other than the stipulated value of one percent of the company at the time of the initial public offering. However, we conclude competent evidence existed to support the jury's verdict. We therefore find no inconsistency in the jury's response to the special interrogatories and the general verdict.

Because the trial court charged the jury the general law regarding contract damages, Affinity argued without objection regarding alternate manners and times to calculate damages, and evidence of other methods to calculate damages was presented to the jury, including the prospectus and testimony, we find the jury's verdict, including its responses to the special interrogatories, to be consistent with each other and supported by the record. We therefore reverse the trial court's award of judgment to the defendants and reinstate the jury verdict.

CONCLUSION

For the foregoing reasons, we affirm the trial court's denial of Ligon's motions for jnov, additur, and new trial absolute. We reverse the trial court's grant of defendants' motion for judgment in conformance with the special interrogatories. Accordingly, the jury's verdict is reinstated.

AFFIRMED IN PART AND REVERSED IN PART.

HEARN, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert D. Rutland, Appellant,

v.

Holler, Dennis, Corbett, Ormond & Garner (Law Firm) and James J. Corbett (Individual), Respondents.

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 4171
Submitted October 1, 2006 – Filed October 30, 2006

AFFIRMED

Robert D. Rutland, pro se, of West Columbia.

Cynthia K. Mason, of Columbia; Daniel Roy Settana, Jr., of Columbia; for Respondents.

BEATTY, J.: Robert Rutland appeals the circuit court's order awarding attorney's fees and costs to Respondents pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act. We affirm.[1]

FACTS

In 1987, Rutland was terminated from his employment as a project engineer for Yates Development Corporation (Corporation). After the Corporation filed for bankruptcy in 1991, a dispute over the Corporation's patents arose between Rutland and Larry Yates, the owner of the Corporation. In conjunction with this dispute, Yates was indicted in federal court for bankruptcy fraud. Pursuant to an agreement, the charge was dismissed against Yates. In turn, Yates, who was represented by Francis Draine, filed a federal action against Rutland, the United States, and several government officials for what he claimed to be a groundless indictment and prosecution. After the case against Rutland was dismissed by the federal district court, Rutland brought suit, case number 97-CP-40-4380, in the Richland County Court of Common Pleas against Yates and Draine for several causes of action, including malicious prosecution. Although the court granted summary judgment in favor of Draine, Rutland's counsel, James Corbett, obtained a $350,000 judgment against Yates. Corbett appealed the dismissal of the case against Draine to this court. After we affirmed the grant of summary judgment, Rutland's counsel petitioned for certiorari to our supreme court. The supreme court denied the petition.

Subsequently, Rutland, proceeding pro se, sued Corbett and his law firm for legal malpractice, breach of contract, and fraud in case number 02-CP-40-1724. On January 30, 2004, Circuit Court Judge Alison Lee issued a form order, and ultimately a formal order, granting summary judgment in favor of Corbett and his law firm on the cause of action for legal malpractice and denying summary judgment for the remaining claims. On February 11,

[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

2004, Circuit Court Judge Reginald Lloyd dismissed Rutland's claims for breach of contract and fraud pursuant to Rule 12(h)(2) of the South Carolina Rules of Civil Procedure.

While case number 02-CP-40-1724 was pending, Rutland filed another lawsuit against Corbett, case number 02-CP-40-1843, alleging legal malpractice arising out of the circuit court trial in which Corbett obtained a verdict of $350,000 in favor of Rutland against Yates. This lawsuit ended in a grant of summary judgment for Corbett.

On February 24, 2004, Rutland filed a third lawsuit, case number 04-CP-40-0900, against Corbett and his law firm for breach of contract and fraud based on the above-outlined facts. After a hearing, Circuit Court Judge Casey Manning issued a form order on August 9, 2004, granting the defendants' motion to dismiss. Judge Manning indicated that he would issue a formal order. The clerk of court's office mailed a copy of the form order to the parties on August 10, 2004.

On September 1, 2004, Respondents filed a motion for attorney's fees and costs pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act.[2] On December 7, 2004, Judge Manning issued his formal order in which he dismissed Rutland's lawsuit against Respondents on the grounds of res judicata/collateral estoppel and insufficient service of process.[3]

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[2] The provisions of this Act are outlined in sections 15-36-10 through 15-36-50 of the South Carolina Code. S.C. Code Ann. §§ 15-36-10 to -50 (2005). We note that section 15-36-10 was completely revised by Act No. 27, 2005 S.C. Acts 114, § 5, which became effective on July 1, 2005, and sections 15-36-20 through -50 were repealed by Act No. 27, 2005 S.C. Acts 121, § 12, which became effective on March 21, 2005. Because Respondents filed their motion on September 1, 2004, we believe the original Act still governed Judge Manning's decision. Moreover, Rutland does not challenge the applicability of the former Act.

[3] Rutland appealed this order on January 5, 2005, but voluntarily withdrew the appeal shortly after filing it.

A hearing on Respondents' motion for attorney's fees and costs was originally scheduled for December 7, 2004, but was continued until April 12, 2005, as a result of Rutland being hospitalized.

By order dated September 20, 2005, Judge Manning granted Respondents' motion for attorney's fees and costs in the amount of $2,585.79. Rutland appeals.

DISCUSSION

I.

Rutland argues Judge Manning did not have jurisdiction to rule on Respondents' motion for attorney's fees and costs because the motion was untimely. Specifically, Rutland contends Respondents failed to file their motion within ten days of Judge Manning's order dismissing Rutland's lawsuit on August 9, 2004. We disagree.

"The established case law is that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed." Ex parte Beard, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct. App. 2004). "[B]ecause a trial judge retains jurisdiction pursuant to Rule 59(e), SCRCP, to alter or amend a judgment within ten days of its issuance, a motion for sanctions would be timely if filed within ten days of judgment." Pitman v. Republic Leasing Co., 351 S.C. 429, 431, 570 S.E.2d 187, 189 (Ct. App. 2002).

In the instant case, Judge Manning issued a form order dismissing Rutland's case against Respondents on August 9, 2004. In issuing this order, Judge Manning specifically indicated that he intended to file a formal order. Thus, Judge Manning retained jurisdiction until the time for post-trial motions elapsed after the issuance of his formal order on December 7, 2004. Accordingly, Respondents' motion filed on September 1, 2004, was timely and Judge Manning had jurisdiction to rule on the motion. See Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 605, 567 S.E.2d 514, 518 (Ct. App. 2002) (noting that a form order is not a final order if the circuit court

specifies that a formal order will be filed); see also Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996) ("Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final.").

II.

Turning to the merits of the appeal, Rutland argues Judge Manning erred in granting Respondents' motion. Rutland contends Respondents failed to meet the burden of proof as required under the South Carolina Frivolous Civil Proceedings Sanctions Act. Additionally, Rutland asserts he presented evidence that he brought the causes of action against Respondents with a proper purpose, thus, negating the imposition of sanctions under the Act. We disagree.

"The determination of whether attorney's fees should be awarded under the Frivolous Proceedings Act is treated as one in equity." Hanahan v. Simpson, 326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997). In reviewing the award in issue, this Court may take its own view of the preponderance of the evidence." Id. "However, following the determination of facts, an appellate court applies an abuse of discretion standard in reviewing the decision to award sanctions and the specific sanctions awarded." Ex parte Beard, 359 S.C. at 357, 597 S.E.2d at 838.

The South Carolina Frivolous Civil Proceedings Sanctions Act provides:

> Any person who takes part in the procurement, initiation, continuation, or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney's fees and court costs of the other party if:
>
> (1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; and

(2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.

S.C. Code Ann. § 15-36-10 (2005).

In order for a litigant to receive attorney's fees and costs under the Act, he has the burden of proving:

(1) the other party has procured, initiated, continued, or defended the civil proceedings against him;
(2) the proceedings were terminated in his favor;
(3) the primary purpose for which the proceedings were procured, initiated, continued, or defended was not that of securing the proper discovery, joinder of parties, or adjudication of the civil proceedings;
(4) the aggrieved person has incurred attorney's fees and court costs; and
(5) the amount of the fees and costs set forth in item (4).

S.C. Code Ann. § 15-36-40 (2005). "Section 15-36-20 creates a presumption that a person taking part in the initiation or continuation of proceedings acted with a proper purpose 'if he reasonably believes in the existence of facts upon which his claim is based' and . . . reasonably believes under the facts that his claim may be valid under existing or developing law." Hanahan, 326 S.C. at 156, 485 S.E.2d at 912 (quoting S.C. Code Ann. § 15-36-20(1)(Supp. 1995)).

Here, Judge Manning found Respondents established that Rutland filed this lawsuit "primarily for a purpose other than securing discovery or adjudication of a claim and that the lawsuit was terminated in their favor." Additionally, Judge Manning stated "[Rutland] was unable to establish that he instituted this action for a proper purpose as defined by South Carolina Code Annotated § 15-36-20."

Taking our own view of the preponderance of the evidence, we find Judge Manning properly imposed sanctions and awarded Respondents attorney's fees and costs. In terms of Respondents' burden of proof, they

established the requisite elements of section 15-36-40. Respondents offered evidence: (1) that Rutland initiated case number 04-CP-40-0900 against them; (2) the lawsuit was dismissed; (3) they incurred attorney's fees and costs in defending against the action; and (4) of the amount of the fees and costs. Furthermore, Respondents were able to show that the primary purpose for which the proceedings were initiated "was not that of securing the proper . . . adjudication of the civil proceedings." A review of the record reveals that the lawsuit at issue alleged causes of action for the same complaint as the previous lawsuits, i.e., Rutland's dissatisfaction with Corbett and his law firm. Significantly, Rutland filed one of the lawsuits despite the fact that Corbett procured a judgment in his favor of $350,000. Rutland also withdrew his appeal of Judge Manning's dismissal of the instant lawsuit. Furthermore, the complaints were ultimately resolved in favor of Respondents either through a grant of summary judgment or, as in the instant lawsuit, a motion to dismiss. In light of this unsuccessful procedural history, it is inconceivable that Rutland reasonably believed that his claims against Respondents were valid.

III.

In the alternative, Rutland contends Judge Manning erred in awarding Respondents attorney's fees and costs in the amount of $2,585.79. He asserts Judge Manning failed to limit the amount awarded to the affidavit submitted by Respondents in support of their motion. We disagree.

In support of their motion for attorney's fees and costs, Respondents submitted an affidavit on September 1, 2004, in which they requested an award of $1,397.39. At the hearing on the motion, which was held on April 12, 2005, Respondents requested a total of $2,585.79 for additional fees and costs incurred for the continued defense of Rutland's action against them.

It is indisputable Respondents incurred attorney's fees and costs in defending against case number 04-CP-40-0900 at the trial level and in preparing for the appeal of Judge Manning's dismissal of the case. Respondents offered evidence of the amount requested through Corbett's

affidavit. Respondents' counsel also indicated that Respondents had incurred additional fees since the affidavit was submitted for a total of $2,585.79. Thus, we find Judge Manning did not abuse his discretion in awarding the entire amount requested by Respondents.

Accordingly, the decision of the circuit court is

AFFIRMED.

GOOLSBY and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Clinton Roberson, Appellant.

Appeal From Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 4172
Submitted October 1, 2006 – Filed October 30, 2006

REVERSED AND REMANDED

Acting Chief Attorney Joseph L. Savitz, III, of Columbia; for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor David M. Pascoe, Jr., of Summerville; for Respondent.

BEATTY, J.: Clinton Roberson was tried in absentia and without counsel for the charge of failing to register as a sex offender. After the jury convicted Roberson, the circuit court judge sentenced Roberson to ninety days imprisonment. Roberson appeals the judge's denial of his motion for a new trial. We reverse and remand for a new trial.[1]

FACTS

On October 6, 1999, Roberson was arrested for failing to register as a sex offender pursuant to sections 23-3-460 and 23-3-470 of the South Carolina Code.[2] According to the affidavit attached to the arrest warrant, Roberson had been previously convicted of committing a lewd act on a minor and failed to re-register as a sex offender after he moved from Dorchester County to Charleston County. Roberson was released on bond the day after his arrest. The terms of the bond required Roberson to appear for roll call at the term of general sessions court in Dorchester County beginning on November 29, 1999. By signing the bond, Roberson acknowledged that he would be tried in his absence if he failed to appear in court. The Dorchester County Solicitor's office mailed to Roberson's last known address two notices of appearance for the terms of court scheduled for November 29, 1999, and January 10, 2000.

On February 16, 2000, Roberson was tried in his absence and without counsel before a Dorchester County jury. After the jury convicted Roberson

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[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

[2] These sections outline the requirements for complying with the South Carolina Sex Offender Registry and the penalties for failing to comply. S.C. Code Ann. §§ 23-3-460 to -470 (Supp. 2005). During the course of this appeal, both of these statutes were amended effective January 1, 2006, and July 1, 2006. These amendments, however, do not affect the disposition of this appeal. Act No. 141, 2005 S.C. Acts 1614-16; Act No. 342, 2006 S.C. Acts ___.

of failing to register as a sex offender, the circuit court judge issued a sealed sentence of ninety days imprisonment.

On April 24, 2003, Roberson, who was represented by counsel, appeared before the circuit court to be sentenced. During this hearing, Roberson inquired whether he was represented by counsel at trial. Based on this inquiry, Roberson's counsel moved for a new trial on the grounds Roberson did not knowingly and voluntarily fail to appear for his trial and he was denied his right to be represented by counsel at the trial. Because it was not clear whether Roberson had been represented at trial, the judge continued the motion until a trial transcript could be located.

During the hearing on the motion, Roberson's counsel contended Roberson was not aware of the trial date[3] and he was not represented by counsel at trial. Based on these grounds, counsel requested that the circuit court vacate Roberson's conviction and grant him a new trial. In response, the solicitor asserted Roberson waived his right to counsel by failing to appear. Additionally, the solicitor claimed Roberson was apprised of his right to counsel at the bond hearing. At the conclusion of the hearing, the circuit court judge denied Roberson's motion. The judge found that Roberson had waived his right to counsel because the terms of his bond indicated that he would be tried in absence if he failed to appear and he had been informed of his right to counsel at the bond hearing. Roberson appeals.

DISCUSSION

Roberson argues the circuit court judge erred in denying his motion for a new trial because he was denied the right to counsel at trial. We agree.

"The Sixth Amendment guarantees criminal defendants a right to counsel. This right may be waived." State v. Gill, 355 S.C. 234, 243, 584

[3] Although the record on appeal does not indicate whether Roberson received the proper notification of his trial date, we note this is not an issue raised on appeal.

S.E.2d 432, 437 (Ct. App. 2003)(citations omitted). This court has explained that "[a] defendant may surrender his right to counsel through (1) waiver by affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture." State v. Thompson, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003).

Initially, we note neither the first nor the third above-outlined condition has been met to constitute a waiver of Roberson's right to counsel. In terms of the first condition, there is no evidence in the record establishing that a trial judge advised Roberson of his right to counsel and warned him of the dangers of self-representation. See Prince v. State, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990) (discussing Faretta v. California, 422 U.S. 806 (1975), and noting that Faretta allows a defendant to waive his right to counsel if the following conditions are satisfied: (1) the accused is advised of his right to counsel and (2) adequately warned of the dangers of self-representation). Furthermore, we reject the State's contention that Roberson implicitly waived his right to counsel by signing his bond form. Although the form stated that Roberson would be tried in his absence if he failed to appear for his trial, we do not believe that Roberson's acknowledgment of this statement can be construed as an affirmative waiver of his right to counsel.

Regarding the third condition, this court has stated that "[s]ituations where a defendant's own conduct forfeits his right to counsel are unusual, typically involving a manipulative or disruptive defendant." Thompson, 355 S.C. at 267, 584 S.E.2d at 137. The record is devoid of any egregious misconduct on the part of Roberson to warrant the drastic sanction of forfeiture of the right to counsel. Significantly, the only apparent misconduct is Roberson's failure to appear at his trial.

Accordingly, we confine our analysis, as do the parties, to the question of whether Roberson waived his right by his conduct, i.e., by failing to appear for trial. In answering this question, we are guided by this court's decision in State v. Thompson, 355 S.C. 255, 584 S.E.2d 131 (Ct. App. 2003). In Thompson, the defendant was tried in absentia and without counsel for the offenses of discharging a firearm into a dwelling and malicious injury to personal property over $1,000 but less than $5,000. After the jury convicted

Thompson, the judge issued a sealed sentence. At sentencing, Thompson's counsel moved for a new trial because he was denied the right to counsel. Counsel claimed that Thompson had appeared at four or five roll calls after his arrest. Additionally, counsel alleged that Thompson, despite his request, had been turned down for a public defender because he did not meet the financial requirements to qualify. In terms of Thompson's failure to appear at trial, his counsel informed the court that Thompson was not given adequate notice of the trial date. Id. at 260, 584 S.E.2d at 133. The court denied Thompson's motion for a new trial. Id. at 260, 584 S.E.2d at 134. On appeal, this court reversed the decision of the circuit court. We held that Thompson's failure to appear at trial did not rise to the level of waiver. Id. at 266, 584 S.E.2d at 136. Our decision was based on the following factors: (1) Thompson had not been advised of the dangers and disadvantages of self-representation under Faretta; (2) there was no inference in the record that Thompson understood the dangers and disadvantages of self-representation; and (3) Thompson did not have a prior record which would have familiarized him with the criminal court system. Id. at 267, 584 S.E.2d at 137.

Applying Thompson to the facts of the instant case, we find Roberson's failure to appear at trial did not constitute an affirmative waiver of his right to counsel. Although Roberson, unlike Thompson, had a prior criminal record, we find this factor alone does not negate the significant fact that Roberson was never advised of proceeding without representation on the current charge. Thus, we cannot infer that Thompson's conduct constituted a waiver of his right.

We are cognizant of the existence of cases where our supreme court has inferred that a defendant waived his right to counsel. In those cases, however, the defendant was represented by counsel prior to trial or had given assurances that he would retain counsel at the time of trial. See State v. Cain, 277 S.C. 210, 210-11, 284 S.E.2d 779, 779 (1981) (inferring waiver of counsel and affirming defendant's conviction and sentence where defendant, who was tried in absentia and without counsel for third-offense driving under the influence, failed to fulfill the conditions of his appearance bond and neglected to keep in contact with his attorney despite knowing the trial was imminent); see also State v. Jacobs, 271 S.C. 126, 126-28, 245 S.E.2d 606,

607-08 (1978) (inferring defendant waived his right to counsel where: (1) trial court allowed defendant, a non-indigent, reasonable time to retain counsel; (2) trial court urged defendant on several occasions to retain counsel and provided defendant access to a telephone and additional time to make the arrangements; (3) defendant on the day of trial did not name his attorney; and (4) defendant failed to make a sufficient showing of reasons for his failure to have counsel present at trial); State v. Gill, 355 S.C. 234, 244, 584 S.E.2d 432, 437-38 (Ct. App. 2003) (inferring defendant waived his right to counsel where defendant failed to retain counsel for trial despite his repeated assurances to the court that he intended to hire private counsel and did not require the appointment of a public defender).

Based on the foregoing, we conclude Roberson was deprived of his fundamental right to the assistance of counsel. Because this denial is a per se reversible error, we reverse the circuit court judge's decision and remand for a new trial. See Thompson, 355 S.C. at 261, 584 S.E.2d at 134 ("The erroneous deprivation of a defendant's fundamental right to the assistance of counsel is per se reversible error.").

REVERSED AND REMANDED.

GOOLSBY and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Margaret O'Leary-Payne, Respondent,

v.

R.R. Hilton Head, II, Inc. and Charter Oak Group, Ltd., Appellants.

Appeal From Beaufort County
James E. Lockemy, Circuit Court Judge

Opinion No. 4173
Heard September 27, 2006 – Filed October 30, 2006

AFFIRMED

Charles E. Carpenter, Jr., and Carmen V. Ganjehsani, both of Columbia and Thomas C. Cofield, of Lexington, for Appellants.

Daniel R. Denton, of Beaufort, David H. Berry, of Hilton Head Island and Henry E. Grimball, of Charleston, for Respondent.

HEARN, C.J.: In this negligence action, R.R. Hilton Head, II, Inc. and Charter Oak Group, Ltd., (collectively Charter) appeal (1) the trial court's denial of their motion for a directed verdict; (2) the trial court's decision to strike the defense of assumption of the risk; and (3) the trial court's refusal to allow them to argue third party liability in their closing argument. We affirm.

FACTS

Margaret O'Leary-Payne was a manager at Lillian Vernon, a retail store located in the Hilton Head Factory Stores II (Shopping Center).[1] Her duties included breaking down cardboard boxes and transporting them outside to the trash compactor. Lillian Vernon required its employees to remove all trash before the close of the day because it received new shipments early in the morning.

Around dusk on the evening of April 2, 1998, O'Leary-Payne stacked several broken down cardboard boxes up to her waist on a cart. She then proceeded out the back door onto the sidewalk, which she had traversed numerous times before, to take the boxes to the trash compactor and dumpster provided by Shopping Center. Although the sidewalk was lit, it was still quite dim. As O'Leary-Payne was walking down the sidewalk, something caught her foot and she fell backwards. Once she was on the

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[1] Lillian Vernon leased its store from the owner of the Shopping Center, R.R. Hilton Head, II. The lease stated that R.R. Hilton Head, II was responsible for the management and maintenance of the common areas of the Shopping Center, including the sidewalks. Charter Oak Group was the management company for the Shopping Center. Charter Oak Group and R.R. Hilton Head, II performed inspections to ensure that the sidewalks were clear of debris and to detect any hazards. For simplicity's sake, both the owner and management company will be referred to as Charter.

ground, O'Leary-Payne noticed, for the first time, a metal pipe[2] protruding approximately five-and-a-half inches from the sidewalk. As a result of the fall, her foot was bleeding and her shoe was torn. She returned to the store, placed a bandage on the cut, and asked her assistant manager to return with her outside to look at the rod.

The next morning, O'Leary-Payne reported her fall to the manager's office at the Shopping Center. The accident report stated that O'Leary-Payne "tripped over a pipe sticking out [of the] sidewalk." She and the manager then went to the scene of the accident. They observed that no warnings were in place to call attention to the rod.

On May 22, 1998, O'Leary-Payne visited a doctor for problems arising from her fall. In addition to the cut on her foot, she complained of neck and lower back pain and headaches. Immediately after the fall, she had experienced pain in her lower spine and buttocks. After the accident, some of her injuries improved but others worsened. Specifically, she continued to have problems with a vein, and eventually had to strap her right arm to her body because she lost all feeling in the arm. She also was taking several pain medications and using a pain pump.

On January 22, 2001, O'Leary-Payne instituted an action for negligence against Charter. At trial, O'Leary-Payne sought to exclude any evidence of the liability of third parties.[3] The trial court agreed, ruling Charter could not introduce any evidence of third party liability unless O'Leary-Payne opened the door. During O'Leary-Payne's presentation of a

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[2] Eventually, she discovered the pipe was a grounding rod. The rod was located approximately seventeen inches from the wall.

[3] Charter initiated an action against the third parties after O'Leary-Payne brought the action under appeal. In its action, Charter alleged these parties were responsible for O'Leary-Payne's injuries. The third parties included the general contractor, the electrical subcontractor, and a subcontractor of the electrical subcontractor who actually installed the electrical systems and the grounding rod. Upon motion of the third parties, Charter's action was severed from the current action.

video deposition, a discussion arose between the trial court and the attorneys regarding third party liability. O'Leary-Payne was "willing to let [the jury] know there were other attorneys involved and who they represented." The trial court responded, "So you're going to let [Charter's attorney] open the door as far as anything of blaming other people for this situation?" O'Leary-Payne responded, "If he wants to blame the other people in the case . . . he can blame them." The trial court then asked Charter if it wanted the trial court "to let the jury know anything about who these people are, that this is another case going on somewhere else or another forum at another time?" Charter responded that it did not want the trial court to inform the jury about the other parties; it wished to let the video deposition play, and it would say "who [the other attorneys] represent." Charter maintained "it certainly opens my door to talk about the blame of these other people."

Trial proceeded with no further mention of the third parties until the trial court began ruling on motions prior to closing arguments. O'Leary-Payne made a motion to strike Charter's defense of superseding and intervening negligence of other parties. The trial court stated the record contained no evidence of third party liability, but Charter argued that because O'Leary-Payne stipulated that Charter could blame other parties, Charter did not need to present any evidence of the third parties' liability. The trial court responded that "the stipulation was that you could blame, but you didn't blame." The trial court ruled Charter could only argue evidence in the record, and because no evidence had been presented as to who constructed the sidewalk, Charter could not mention third party liability in its closing argument.

At the close of O'Leary-Payne's case, Charter moved for a directed verdict. Charter argued O'Leary-Payne failed to satisfy her burden of proof because she presented no evidence that a hazardous, dangerous, or defective condition existed or that Charter had notice of a defective condition. Upon questioning from the trial court regarding why O'Leary-Payne did not present expert testimony, she answered she was not required to present expert testimony to show a hazard existed because a lay person could determine the rod was hazardous from looking at the photograph. Charter further argued that O'Leary-Payne was improperly attempting to use the doctrine of res ipsa

loquitur to meet her burden. The trial court denied the directed verdict motion. At the close of its case, Charter renewed its motion, which the trial court again denied.

O'Leary-Payne also made a motion to strike Charter's assumption of the risk defense. Charter argued that she assumed the risk by going out on the sidewalk when she knew the lighting was poor and with the boxes stacked high enough to impair her line of sight. Charter argued that she should have waited until the following morning to take the boxes to the dumpster. The trial court granted the motion to strike the defense.

The jury awarded O'Leary-Payne actual damages of $5,981,690, but found O'Leary-Payne was forty percent negligent and thereby reduced the verdict to $3,589,014.[4] Charter moved for a judgment notwithstanding the verdict (JNOV) and a new trial, both of which the trial court denied. This appeal followed.

LAW/ANALYSIS

I. Directed Verdict

Charter argues the trial court erred by failing to grant its motion for a directed verdict on several grounds. Charter maintains (1) O'Leary-Payne relied on the doctrine of res ipsa loquitur and did not present any evidence that Charter created the dangerous condition, and (2) the rod was an open and obvious defect. We disagree.

When ruling on a directed verdict motion, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). This court must follow the same standard. Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). "If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case

[4] No issue was raised on appeal concerning the amount of the verdict.

should be submitted to the jury." Chaney v. Burgess, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965). This court will only reverse the trial court when no evidence supports its ruling. Steinke v. S.C. Dep't of Labor, Licensing, & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

According to South Carolina law, "[o]ne who operates a shopping center where stores are leased to merchants and the owner retains possession and control of the parking area and sidewalks, is not an insurer of the safety of those who use the parking lot and sidewalks as customers of the merchants leasing the stores . . . ." Bruno v. Pendleton Realty Co., 240 S.C. 46, 50-51, 124 S.E.2d 580, 582 (1962). However, "the owner of the premises owes the customers the duty of exercising ordinary care to keep the passageways, sidewalks and such other parts of the premises as are ordinarily used by the customers in transacting business in a reasonably safe condition." Id. at 51, 124 S.E.2d at 582.

A. Res Ipsa Loquitur

Charter argues the trial court erred in failing to grant its directed verdict motion because O'Leary-Payne relied on the doctrine of res ipsa loquitur. We disagree.

Res ipsa loquitur means "the thing speaks for itself." W. Page Keeton et al., Prosser and Keeton on Torts §39, at 243 (5th ed. 1984). According to the doctrine of res ipsa loquitur:

> There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from lack of care.

Id. at 244.

Charter mischaracterizes O'Leary-Payne's argument as being "the rod speaks for itself." O'Leary-Payne did not attempt to prove Charter's negligence by asserting that simply because she was injured at Charter's Shopping Center, Charter was therefore negligent. Instead, she attempted to prove negligence by introducing details about the rod, such as its height and location, from pictures and testimony. Accordingly, we find the trial court did not err in failing to grant Charter a directed verdict on the grounds that O'Leary-Payne relied on res ipsa loquitur to prove negligence.

B. Creation of a Defective Condition

Charter next argues the trial court erred in denying its motion for a directed verdict because O'Leary-Payne presented no evidence that Charter created a dangerous or defective condition. We disagree.

To recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, the plaintiff must show either (1) that the injury was caused by a specific act of the defendant which created the dangerous condition; or (2) that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001).

First, Charter maintains O'Leary-Payne presented no evidence the rod constituted a dangerous or defective condition because she did not have an expert testify the rod was a hazard nor did she demonstrate the rod was improperly placed or installed. We find this argument unavailing.

"[E]xpert testimony is not necessary to prove negligence or causation so long as lay persons possess the knowledge and skill to determine the matter at issue." F. Patrick Hubbard & Robert L. Felix, The Law of South Carolina Torts 167 (2d ed. 1997). Expert testimony is not required to prove proximate cause if the common knowledge or experience of a layperson is extensive enough. Bramlette v. Charter-Med.-Columbia, 302 S.C. 68, 72-73, 393 S.E.2d 914, 916 (1990).

Here, O'Leary-Payne was not required to provide expert testimony that the rod created a dangerous or defective condition. A lay person could determine the rod was a hazard from the pictures of it and testimony about its height and position. Accordingly, we find Charter was not entitled to a directed verdict on the grounds O'Leary-Payne did not use an expert to establish the rod was a hazard.

Next, Charter claims O'Leary-Payne did not present evidence that Charter knew a dangerous or defective condition existed and failed to remedy it.[5] We disagree.

Constructive notice is a legal inference which substitutes for actual notice. It is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts. Strother v. Lexington County Recreation Com'n, 332 S.C. 54, 64, 504 S.E.2d 117, 122 (1998). During trial, Charter admitted O'Leary-Payne had established some evidence of constructive notice of the rod. Further, Charter had adopted a procedure that required its employees to conduct regular inspections of all sidewalks to ensure they were in a safe condition. Therefore, because Charter should have observed the rod during an inspection, it had constructive notice of the rod, and the trial court properly denied its motion for a directed verdict on this ground.

C. Open and Obvious Defect

Charter also claims the trial court erred in not granting its directed verdict motion because the rod was an open and obvious defect, and O'Leary-Payne failed to present any evidence suggesting Charter could have anticipated any harm would arise from it. This argument is not preserved for appellate review because Charter did not raise it to the trial court at the time it requested a directed verdict. See, e.g., Staubes v. City of Folly Beach, 339

[5] Whether Charter had actual notice of the grounding rod is not an issue in this appeal as both Charter and O'Leary-Payne maintained they never noticed the rod at any point prior to the accident.

S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (holding that an issue not raised to or ruled upon by the trial judge is not preserved for appellate review); Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004).

II. Assumption of Risk

Charter claims the trial court erred in striking its assumption of the risk defense. We disagree.

"Assumption of the risk is the deliberate and voluntary choice to assume a known risk." Baxley v. Rosenblum, 303 S.C. 340, 347, 400 S.E.2d 502, 507 (Ct. App. 1991). The doctrine of assumption of the risk embodies the principle that plaintiffs may not recover for injuries received when they voluntarily expose themselves to a known and appreciated danger. Lowrimore v. Fast Fare Stores, Inc., 299 S.C. 418, 424, 385 S.E.2d 218, 221 (Ct. App. 1989).

The supreme court abolished assumption of the risk as a bar to absolute recovery in Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 87-88, 508 S.E.2d 565, 574 (1998). The court, however, limited its ruling to apply to causes of action arising or accruing after November 9, 1998. Id. O'Leary-Payne's cause of action accrued against Charter on April 2, 1998. Therefore, on appeal, Charter correctly argues that assumption of the risk could act as a complete bar to O'Leary-Payne's cause of action because it arose before the effective date of Davenport.

At trial, however, Charter never mentioned the effective date of the Davenport decision nor argued assumption of risk was a complete bar to the action. In fact, in response to the trial court's question as to whether assumption of the risk has been subsumed within comparative negligence, Charter stated: "It is, but still, the law of assumption of risk, even though it's incorporated within comparative, we're still entitled to a charge of that defense, because it's still a viable defense, **it's just not an outright defense**." (emphasis added). Later in the colloquy the trial court provided Charter a second, and final, opportunity to address the assumption of the risk issue, and

again Charter failed to argue any issues relating to the effective date of Davenport or that assumption of the risk would be a complete bar to O'Leary-Payne's action.

Accordingly, the argument that assumption of risk is a complete bar to O'Leary-Payne's action is not preserved for our review because it was neither raised to nor ruled upon by the trial court. See Staubes, 339 S.C. at 412, 529 S.E.2d at 546 (holding that an issue not raised to or ruled upon by the trial judge is not preserved for appellate review).

III. Closing Arguments

Finally, Charter argues the trial court erred by prohibiting it from raising third party liability in its closing argument after O'Leary-Payne stipulated it could blame third parties. We disagree.

Closing arguments must be confined to evidence in the record and reasonable inferences therefrom. State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). A trial court is allowed broad discretion in dealing with the range and propriety of closing argument to the jury. State v. Condrey, 349 S.C. 184, 195-96, 562 S.E.2d 320, 325 (Ct. App. 2002). Ordinarily, the trial court's rulings on such matters will not be disturbed. State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997); see also State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) ("The trial court's discretion will not be overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant."). An appellate court must review the argument in the context of the entire record. Patterson, 324 S.C. at 17, 482 S.E.2d at 766.

Neither Charter nor O'Leary-Payne presented any evidence of third party liability. Charter argues O'Leary-Payne's statement that it could blame third parties rose to the level of a stipulation thereby entitling it to argue third party liability to the jury. While this is admittedly a close issue, we defer to the trial court's judgment regarding the scope of the alleged stipulation. The alleged stipulation occurred early in O'Leary-Payne's case, before O'Leary-Payne even testified. Therefore, Charter had ample opportunity to present

evidence of third party liability, but it did not take advantage of that opportunity. We also note that Charter declined the trial court's offer to advise the jury as to the identity of the third parties and the existence of the other lawsuit. Absent testimony on this issue or the trial court's communication of the stipulation to the jury, the matter of third party liability was not in evidence. Therefore, the trial court correctly refused to allow Charter to blame third parties during closing argument.

CONCLUSION

Based on the foregoing, the order of the trial court is hereby

AFFIRMED.

GOOLSBY and WILLIAMS, JJ., concur.