STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
October 20, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

James Burr,
Defendant Below, Petitioner

Vs.) No. 13-1078 (Monroe County 13-CAP-1)

Greg Elmore,
Plaintiff Below, Respondent

MEMORANDUM DECISION

Petitioner James Burr, by counsel J. Michael Anderson, appeals the September 5, 2013, judgment order of the Circuit Court of Monroe County that awarded damages to respondent in the amount of $8,500.[1] Respondent Greg Elmore, by counsel Jeffry A. Pritt, filed a summary response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds that the circuit court erred in awarding respondent civil damages in excess of its jurisdictional limits on de novo appeal from magistrate court. This case satisfies the "limited circumstances" requirement of Rule 21(d) of the West Virginia Rules of Appellate Procedure and is appropriate for a memorandum decision rather than an opinion. For the reasons expressed below, the decision of the circuit court is affirmed, in part, and reversed, in part, and this case is remanded to the circuit court for further proceedings consistent with this decision.

On April 23, 2012, petitioner presented respondent with a written lease agreement for approximately 137 acres[2] of farmland (hereinafter "the property") in Monroe County, West Virginia, in exchange for $5,000. The lease term was from December 31, 2011, to December 31,

[1]The circuit court also found for petitioner on a counterclaim in the amount of $1,735. The counterclaim is not at issue in this appeal.

[2]For the 2011 calendar year, respondent leased 208 acres, including the 137 acres at issue here, from petitioner. For the 2012 calendar year, petitioner drafted two separate lease agreements—one for 71 acres and the other for 137 acres—allegedly due to petitioner's concerns over the property interests of his partner, Maria DeGroff, in the 137 acres. The issues presented here concern only the 137-acre lease.

2012. Respondent signed the lease agreement and paid petitioner $5,000 that day. In early 2012, based upon a prior agreement with petitioner, respondent purchased cattle and fertilizer for the property. He intended to graze his cattle on the property and sell them in November of 2012. However, the property was sold at a foreclosure auction on August 31, 2012. Due to the foreclosure sale, respondent was forced to remove his cattle from the property on or about September 10, 2012, and to sell them for $0.865 per pound.[3] Respondent later testified that Elva Malone, the lienholder of the property, notified him on August 18, 2012, that the property was in foreclosure and he would have to remove his equipment and cattle from the property on or before August 31, 2012.

On October 11, 2012, respondent, pro se, filed suit against petitioner in the Magistrate Court of Monroe County claiming monetary losses as a result of the property's foreclosure. Respondent sought damages for loss of rent, loss of income, and expenses in regards to the cattle that totaled $2,166.68, plus $85 in court costs. Thereafter, petitioner, also pro se, filed an answer and counterclaim that sought damages from respondent for past-due rent on a separate property, breach of contract for failure to mow petitioner's land, fence damage costs, and loss of income in the amount of $1,575. The magistrate court entered judgment in favor of respondent in the amount of $2,166.68 plus court costs.[4] Petitioner appealed to the Circuit Court of Monroe County; both parties retained counsel for the appeal.

On June 6, 2013, the circuit court held a de novo bench trial on respondent's complaint and petitioner's counter-claim. Petitioner and respondent were the only witnesses to testify. Over petitioner's objection, the circuit court admitted a letter purportedly signed by Ms. Malone. In the letter, Ms. Malone acknowledged that she notified respondent of the foreclosure on August 18, 2012. Ms. Malone did not testify. Respondent testified that by November of 2012 his cattle would have gained 150 pounds each and would have sold for $0.90 per pound. He also testified that the 71-acre parcel adjacent to the 137-acre parcel was not suitable for livestock. On cross-examination, respondent admitted he had not checked the price of cattle per pound in November of 2012, and when asked whether he "was just guessing at that figure," respondent answered, "[p]retty much." However, on redirect-examination, respondent explained that his reasoning for the increased price was based upon years of experience in the cattle industry, with that breed of cattle, and was not just a random guess. Petitioner did not object to this line of testimony, and petitioner presented no evidence to refute the prices offered by respondent or his prior business activity in the cattle trade.

[3]The record on appeal does not provide an exact date respondent removed his cattle from the property. When asked about removal of the cattle at trial, respondent answered, "I think about September 10." The sale appears to have occurred on that date or immediately thereafter.

[4]The record on appeal does not include an order from the magistrate court proceeding. However, the magistrate court appears to have entered a default judgment due to petitioner's failure to appear.

The circuit court determined that petitioner had no right or ability to rent the property after it had been sold at a foreclosure auction on August 31, 2012. The circuit court awarded judgment to respondent in the amount of $8,100 in lost profits based upon respondent's testimony and $400 in lost rent. This appeal followed.

This Court has previously held that:

> "[i]n reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syl. pt. 1, *Public Citizen, Inc. v. First National Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996).

Syl. Pt. 1, *Beverly v. Thompson*, 229 W.Va. 684, 735 S.E.2d 559 (2012).

First, petitioner assigns error to the circuit court's award of $8,500 in money damages. Petitioner argues that the circuit court's jurisdictional limit on money damages in a civil appeal from magistrate court is $5,000—the limit imposed on magistrate courts under West Virginia Code § 50-2-1. Respondent confesses error on this issue. This Court has held that "'[i]n a case where the [respondent] confesses error and indicates that the judgment should be reversed, this Court, upon ascertaining that the errors confessed are supported by law and constitute cause for the reversal of the judgment . . . will reverse the judgment[.]' Syl. pt. 4, *Petition of Hull*, 159 W.Va. 363, 222 S.E.2d 813 (1976)." Syl. Pt. 1, *Sorongon v. W. Va. Bd. of Physical Therapy*, 232 W.Va. 263, 752 S.E.2d 294 (2013). [5]

This Court has long explained that "magistrate court appeals are derivative jurisdictionally." *Monongahela Power Co. v. Starcher*, 174 W.Va. 593, 595, 328 S.E.2d 200, 202 (1985); *see also State ex rel. Honaker v. Black*, 91 W.Va. 251, 253-54, 112 S.E. 497, 497 (1922) ("[T]he circuit court upon an appeal from a [magistrate] can exercise in regard to the controversy pending before the [magistrate] only such jurisdiction as the [magistrate] might have exercised."). In *Monongahela Power Company*, we limited a plaintiff's recovery in a magistrate court civil appeal to circuit court to the jurisdictional limits imposed upon magistrate courts by the West Virginia Code. In doing so, we held that "[t]he general rule is that on a de novo appeal from a magistrate court judgment, the amount demanded cannot be increased beyond the jurisdictional limit of the magistrate court." 174 W.Va. at 593, 328 S.E.2d at 200, Syl. Pt. 2. West Virginia Code § 50-2-1 provides that magistrate courts "shall have jurisdiction of all civil actions wherein the value or amount in controversy . . . exclusive of interest and cost, is not more than five thousand dollars." Therefore, this Court agrees with the parties that the circuit court erred when it awarded money damages in excess of its jurisdictional limit for a civil appeal from magistrate court. Accordingly, this Court reverses the circuit court's judgment to the extent the

[5] *See also* Syl. Pt. 8, *State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991) ("This Court is not obligated to accept the State's confession of error in a criminal case. We will do so when, after a proper analysis, we believe error occurred.").

award is in access of the magistrate court's jurisdictional limit of $5,000 and remands the matter for further proceedings consistent with this decision.

Petitioner's next assignment of error concerns the admission of Ms. Malone's letter. Petitioner argues that the letter was hearsay and was highly prejudicial in that it formed the basis of the $8,100 judgment for respondent's lost profits. The circuit court admitted the letter under the business record exception set forth in Rule 803(6) of the West Virginia Rules of Evidence.[6] Ms. Malone did not testify at trial, and the letter reports that Ms. Malone informed respondent that the property was to be sold on August 31, 2012, which required respondent to remove all cattle and equipment from the property on or before that date. Upon a review of the record, the parties' arguments, and the pertinent legal authority, we conclude that even if the letter's admission were an abuse of discretion, such error was harmless. Rule 61 of the West Virginia Rules of Civil Procedure[7] and Rule 19 of the West Virginia Rules of Civil Procedure for Magistrate Courts[8] both provide that error shall be disregarded if it does not affect substantial rights. Respondent testified that the property was sold at the foreclosure sale on August 31, 2012, which caused him to remove his cattle from the property. The Elva Malone letter only supported

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[6]Rule 803(6) provides as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> . . . .
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> (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

[7]Rule 61 provides as follows:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

[8]Rule 19 provides follows:

> The magistrate at every stage of the proceeding shall disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

the uncontested fact that the property was sold at auction on August 31, 2012. Petitioner did not dispute that fact below, nor does he do so on appeal.

Last, in a cursory argument, petitioner assigns error to the circuit court's finding of lost profits based upon respondent's testimony. Petitioner argues that respondent's testimony as to the future weight gain and price per pound of his cattle was both speculative and remote. See *Given v. Field*, 199 W.Va. 394, 484 S.E.2d 647 (1997) ("'A new business may recover lost profits in a breach of contract action, but only if the plaintiff establishes the lost profits with reasonable certainty; lost profits may not be granted if they are too remote or speculative.' Syllabus Point 2, *Cell, Inc. v. Ranson Investors*, 189 W.Va. 13, 427 S.E.2d 447 (1992)."). Petitioner appears to argue that respondent's lost profits were from a "new business," and the award for $8,100 in lost profits based upon that testimony must be reversed. However, petitioner cites no portion of the record where he objected to petitioner's testimony as remote or speculative. Petitioner did cross-examine respondent on the bases for his figures, but he did not assert before the circuit court that petitioner's testimony on his damages should be excluded or otherwise disregarded as remote or speculative. We have often stated that "[g]enerally the failure to object constitutes a waiver of the right to raise the matter on appeal." *State v. Asbury,* 187 W.Va. 87, 91, 415 S.E.2d 891, 895 (1992) (per curiam); *see also* Syl. Pt. 1, *Mowery v. Hitt,* 155 W.Va. 103, 181 S.E.2d 334 (1971) ("[T]his Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken."). Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure also provides, in part, as follows:

> The argument must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The Court may disregard errors that are not adequately supported by specific references to the record on appeal.

Petitioner failed to raise this objection to the circuit court. Therefore, we will not address it for the first time on appeal.

Accordingly, the September 5, 2013, order of the Circuit Court of Monroe County is affirmed, in part, reversed, in part, and remanded for further proceedings consistent with this decision.

Affirmed, in part, reversed, in part, and remanded.

ISSUED: October 20, 2014

CONCURRED IN BY:

Chief Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II