COURT OF APPEALS OF VIRGINIA

Record No. 0871-25-2

MATTHEW J. GERBER
v.
JAMES C. JUSTICE COMPANIES, INC., ET AL.

Present: Judges Causey, Raphael and Duffan

Argued at Lexington, Virginia

Opinion Issued September 8, 2026*

FROM THE CIRCUIT COURT OF ALBEMARLE COUNTY
Cheryl V. Higgins, Judge

Evan D. Mayo (Daniel R. O. Long; Payal C. Sampat; Mayo Law Group PLLC, on briefs), for appellant.

Aaron B. Houchens (Aaron B. Houchens, P.C., on brief), for appellee James C. Justice Companies, Inc.

MEMORANDUM OPINION BY
JUDGE KEVIN M. DUFFAN

Matthew J. Gerber appeals the Albemarle County Circuit Court's order granting James C. Justice Companies, Inc.'s (JCJC) "Post-Trial Motion for Enforcement of Settlement Credit and Reduction of Pre-Judgment Interest" under Code § 8.01-35.1. The circuit court's order mandated that JCJC's judgment be completely offset by Gerber's settlement with previous co-defendant, Carey Douglas Kessler & Ruby, PLLC (CDKR). The issues on appeal are: (1) whether JCJC and CDKR caused the "same injury" to Gerber, (2) whether JCJC met its burden in its motion for the offset, (3) whether the circuit court was required to apportion CDKR's settlement, and (4) whether Gerber waived his computer fraud claim against CDKR. For the following reasons, we affirm.

* This opinion is not designated for publication. *See* Code § 17.1-413(A).

BACKGROUND

I. The Underlying Commission Transaction

At the beginning of his career as a financial investment manager, Matthew J. Gerber met James (Jay) C. Justice, III through a mutual friend. Gerber began working with JCJC, a holding company of real estate and mineral interests, in 2008. The scope of his arrangement[1] was to manage the sale of companies owned by the Justices to "build out [their] family investment office." At the time of trial, Jay Justice was the president and chief executive officer of JCJC. Jay Justice thought of Gerber as a "contractor" for JCJC by the time Gerber was terminated.

JCJC owned property called the Presidential Estates. In 2018, JCJC was interested in preserving building rights on the property and maximizing the value of a potential conservation easement on the land.[2] The reason being that, once the easement was assessed, appraised, recorded, and then donated, the owner would qualify for a federal tax deduction, and the Commonwealth of Virginia would issue JCJC a tax credit for the donated easement. After issuance, the Commonwealth allowed JCJC to sell the credits to third parties. For his work on this project, Gerber expected to receive "two percent compensation" of all proceeds coming from the tax credit sales.

The conservation easement was recorded in 2019. JCJC sold three tranches of tax credits it received from the donation of the easement. Around 2020, Gerber received his first payment from the sale of the first tranche of tax credits. JCJC sold the second tranche in 2022, but instead of Gerber's commission being sent directly to him, Todd Hochrein, a tax credit broker at the

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[1] Gerber testified that he never received a "formal written employment agreement with anybody that worked for [the] Justice family," but that he negotiated his compensation with Jay Justice through e-mail. Jay Justice testified the same.

[2] The purpose in creating a conservation easement was to conserve or "ensure [the property's] protection from commercial development activities."

Virginia Conservation Credit Exchange (VCCE), sent Gerber's "fee . . . [to] an escrow account for outside counsel for [JCJC]." JCJC's outside counsel at CDKR, Steve Ruby, directed Hochrein to put Gerber's commission into CDKR's escrow account.

Jay Justice testified that JCJC took issue with Gerber's assurance to it that the conservation easement was worth $20 million because the Commonwealth's valuation came out to be only $4 million. Because of this significant difference, JCJC pursued litigation against the Commonwealth in the Richmond City Circuit Court. In response to that litigation, Ruby advised that "[JCJC was] better off . . . escrow[ing] [Gerber's commission] and deal[ing] with it down the road."

In February 2021, JCJC terminated its relationship with Gerber. Jay Justice testified that JCJC had already "paid [Gerber] for the work that he had done on *the first tranche*." (Emphasis added). And so, "there were no tax credits owed, and [Gerber] wasn't paid anything, based on that." As explained above, JCJC sold the second tranche of tax credits in 2022, after termination of the relationship with Gerber.[3]

In total, Gerber was supposed to receive approximately $190,000[4] in commission. By the time of trial, September 2024, his commission was still being held in CDKR's escrow account.

II. Gerber's Complaints and Settlement with CDKR

On June 17, 2022, Gerber filed his initial complaint against JCJC, Jay Justice, James C. Justice, II (collectively JCJC), and subsidiary companies[5] owned in some capacity by JCJC.

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[3] Jay Justice testified that he and Gerber never discussed whether Gerber would still be entitled to commissions from tax credit sales in the event that he was terminated.

[4] The exact amount is $192,078.

[5] The defendant corporations affiliated with JCJC are: Bluestone Resources, Inc., Bluestone Coal Sales Corporation, the Greenbrier Hotel Corporation, and Blackstone Energy, Ltd.

Gerber filed an amended complaint on September 8, 2023, adding new claims against JCJC, as well as adding CDKR as a defendant. The court granted Gerber's motion to amend.

Relevant to this appeal—for the unpaid commissions from the Presidential Estates conservation easement—Gerber pursued the following claims against the respective defendants: (1) Count IV for breach of contract against JCJC, (2) Count VII for computer fraud against CDKR, (3) Count IX for tortious interference with contract or business expectancy against JCJC and CDKR, and (4) Count X[6] for conversion against CDKR. Gerber sought compensatory damages, punitive damages, prejudgment interest, attorney fees and costs, and any other relief the court found appropriate.

On November 20, 2023, Gerber served process on CDKR, but it did not respond timely in violation of Rule 3:8(a). Accordingly, on February 15, 2024, Gerber moved for default judgment against CDKR pursuant to Rule 3:19(a), which was subsequently granted by the Albemarle County Circuit Court.

In response to the default judgment, on August 28, 2024, Gerber and CDKR executed a "Settlement Agreement and Release of All Claims" (Settlement Agreement).[7] As denoted in the Settlement Agreement, the "Basis for [Gerber's] Claims" against CDKR was tortious interference with a contract or business expectation and conversion. Pursuant to the Settlement Agreement, Gerber agreed to join CDKR's motion to vacate the default judgment, and agreed

[6] There is a typographical error in the amended complaint listing two Count IXs for two separate causes of action. The first is for tortious interference against JCJC and CDKR, the second is for conversion against CDKR. The first will be referred to as Count IX and the second will be referred to as Count X, hereinafter.

[7] "Although parts of the record are sealed, this appeal requires unsealing certain portions to resolve the issues raised by [the appellant]. To the extent that certain facts are found in the sealed portions of the record, we unseal those portions only as to those specific facts mentioned in this opinion." *Khine v. Commonwealth*, 75 Va. App. 435, 442 n.1 (2022). "The rest remains sealed." *Id.*

that he would withdraw all claims against CDKR. Furthermore, in consideration of Gerber's withdrawal of the claims, CDKR paid Gerber $205,000; this amount was not paid with the $190,000 in CDKR's escrow account.

III. Trial and Post-Trial with JCJC

The remaining parties, Gerber and JCJC (and its affiliated companies), commenced trial on September 4, 2024. Relevant to this appeal, the jury found that there was a contract between Gerber and JCJC and that JCJC breached this contract with respect to the conservation easement commission, so it awarded Gerber compensatory damages of $192,078, as well as prejudgment interest.

On September 26, 2024, JCJC subsequently filed a "Motion for Enforcement of Settlement Credit and Reduction of Pre-Judgment Interest" (Motion). In its Motion, JCJC argued that by directing CDKR to hold Gerber's easement commission in escrow, JCJC and CDKR were both "joint actors in causing harm to Gerber." Therefore, because CDKR settled its dispute with Gerber, notably by giving Gerber $205,000 in consideration, JCJC was entitled to a credit against the judgment under Code § 8.01-35.1. Furthermore, JCJC argued that CDKR's settlement should completely offset any damages JCJC owed, reducing them to $0.

Gerber responded to the Motion,[8] arguing, in short, that JCJC "[sought] to benefit from [Gerber's] settlement of *different* claims, arising out of *different* facts, made against a *different* defendant in the time leading up to trial." (Emphases added). Gerber also argued that, in the alternative, even if JCJC was entitled to an offset, his settlement with CDKR should not cover JCJC's entire judgment, but only a "[m]odest [p]ortion."

On January 17, 2025, the circuit court heard argument on the Motion. On brief, both parties acknowledged that JCJC did not present new evidence to support its Motion; the circuit

[8] JCJC filed a reply brief supporting its Motion.

court relied on the trial record and the Settlement Agreement. The parties gave argument and the court subsequently held that Gerber's claims of injuries caused by JCJC and CDKR were the same and granted JCJC's Motion. Accordingly, the court ordered that CDKR's settlement offset JCJC's judgment in full, reducing it to $0. The court also vacated Gerber's default judgment against CDKR and dismissed the claims related to that judgment. Gerber appeals.

ANALYSIS

I. Standard of Review

This appeal includes questions of both law and fact. "This Court reviews an issue of statutory interpretation de novo." *Llewellyn v. White*, 297 Va. 588, 595 (2019). "In such review, this Court seeks to effectuate the intent of the legislature as expressed by the plain meaning of the words used in the statute." *Id.* "[T]his Court applies the plain language unless the words are ambiguous or such application would render the law internally inconsistent or incapable of operation." *Id.*

"[T]his Court defers to the trial court's factual findings unless they are plainly wrong or without evidence to support them." *Harris v. Joplin*, 304 Va. 338, 347 (2025). Furthermore, this Court will defer "to the trial court's factual findings in order to review the court's application of the law to those facts." *Christian Scholars Network, Inc. v. Montgomery Cnty.*, 86 Va. App. 600, 613 (2026) (quoting *Daily Press v. City of Newport News*, 265 Va. 304, 309 (2003)).

II. JCJC and CDKR caused the same injury to Gerber.

On appeal, Gerber argues that JCJC's action in directing CDKR to put his conservation easement commission in escrow constitutes two separate injuries, and therefore Gerber's settlement with CDKR should not offset JCJC's judgment. We disagree.

The operative statute in this appeal is Code § 8.01-35.1, stating, in part:

> A. When a release or a covenant not to sue is given in good faith to one of two or more persons liable for the same injury to a person or property, or the same wrongful death:
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> 1. It shall not discharge any other person from liability for the injury, property damage or wrongful death unless its terms so provide; but any amount recovered against the other person or any one of them shall be reduced by any amount stipulated by the covenant or the release, or in the amount of the consideration paid for it, whichever is the greater. . . .
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> 2. It shall discharge the person to whom it is given from all liability for contribution to any other person liable for the same injury to person or property[.]

"The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to the plaintiff by the defendant's breach of duty." *Dominion Res., Inc. v. Alstom Power, Inc.*, 297 Va. 262, 270 (2019). Furthermore, and relevant to this appeal, "[a] party who has committed a breach of contract, and a party who induced the breach, may both be held fully liable for the resulting injuries suffered by the plaintiff." Restatement (Third) of Torts: Liability for Economic Harm § 17 cmt. b (A.L.I. 2020). But "[a]t the same time . . . a suit [for tortious interference with contract] and a suit for breach of contract may not be used to produce a double recovery." *Id.* As a result, "any payments made by the one who breaks the contract or partial satisfaction of the judgment against him *must be credited* in favor of the defendant who has caused the breach." Restatement (Second) of Torts § 774A cmt. e (A.L.I. 1979) (emphasis added). "[T]o the extent that there is a duplication of the damages[,] any payments made by the tortfeasor must be credited in favor of one who has broken the contract." *Id.*

Gerber argues that JCJC and CDKR's injuries are distinct in two ways. In doing so, he argues that we "must look at the injury or damage covered by the release." *Tazewell Oil Co. v. United Va. Bank/Crestar Bank*, 243 Va. 94, 115 (1992). First, he argues that the injuries are different because JCJC's injury arose in contract, while CDKR's injury arose in tort.[9] Second, he argues that the injuries were different because of the timing. On brief, he specifies that his contract claims against JCJC occurred "over the course of several years," because he had ongoing communications with JCJC regarding unpaid commissions starting in February 2021. Gerber's tort claim against CDKR specifically targets the withholding of his conservation easement commission in "late 2022."

In arguing the distinction between these two causes of action—tort and contract—Gerber cites *Llewellyn*. In *Llewellyn*, the defendant asserted that she was entitled to an offset in judgment related to a car accident because the plaintiff received a settlement from her insurer. 297 Va. at 594. While the Virginia Supreme Court noted the difference between the insurer's contractual duties and the defendant's duties in tort, it found that the insurer's duty to compensate the plaintiff arose only because of the defendant's tortious conduct. *Id.* at 597. It emphasized that the insurer's payment to the plaintiff was not to compensate her personal injuries, "but to protect [the plaintiff] against the potential inadequacy of Llewellyn's assets to pay . . . damages" arising from Llewellyn's conduct. *Id.* Therefore, Llewellyn was still liable to the plaintiff for her personal injuries and was not entitled to an offset in judgment from the insurer's payment. *Id.* at 597-98.

In our reading of *Llewellyn*, if a contractual party tortiously harms a plaintiff, it will be held liable for the plaintiff's personal injuries in the same manner as a non-contractual party.

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[9] "The primary consideration underlying tort law is the protection of persons and property from injury, while the major consideration underlying contract law is the protection of bargained for expectations." *Kaltman v. All Am. Pest Control, Inc.*, 281 Va. 483, 492-93 (2011) (quoting *Filak v. George*, 267 Va. 612, 618 (2004)).

Here, JCJC tortiously harmed Gerber by directing that his commission be put in escrow, so its status as a contractual party, alone, does not mean that its injury was distinct from CDKR's.[10]

Additionally, in arguing the importance of timing, Gerber cites *Askew v. Collins*, 283 Va. 482 (2012). In *Askew*, the defendant made disparaging comments about the plaintiff to the press on January 8, 2003; the press published an article about the defendant's statement on January 21, 2003. *Id.* at 485. The Virginia Supreme Court found the difference in timing legally significant because "[a]ny cause of action that a plaintiff has for *defamation* accrues on the date that the defamatory acts occurred." *Id.* at 487 (emphasis added) (quoting *Jordan v. Shands*, 255 Va. 492, 498 (1998)). The separate defamatory publications caused distinct injuries, and therefore the defendant was not entitled to an offset in judgment from the press's settlement with the plaintiff. *Id.* This kind of legal significance related to the timing of the cause of action is not present in Gerber's appeal.

"[L]ook[ing] at the injury or damage covered by the release," we find Gerber's attempt to distinguish JCJC and CDKR's actions unavailing. *Tazewell Oil Co.*, 243 Va. at 115. Included in the "Basis for Claims" section of the Settlement Agreement is a specific reference to Gerber's claimed damages "arising from tortious interference with contract or business expectancies and conversion against CDKR." Moreover, the injury claimed in the first amended complaint against CDKR for tortious interference and conversion was the same as the injury claimed for breach of contract against JCJC: "the withholding of Mr. Gerber's commissions." Gerber alleged that commission amount to be $200,000. The consideration CDKR provided for Gerber's withdrawal of these claims was $205,000. Thus, the trial court could properly conclude that the settlement

[10] Gerber is correct to note that the General Assembly removed "tort-feasor" and "liable in tort" from the statute "to expand the statute's application to injuries other than tortious injury." *Llewellyn*, 297 Va. at 596 n.1; 2007 Va. Acts ch. 443. But that does not automatically make the injuries caused by tortious conduct different from those caused by breach of contract. To the contrary, this change indicates that these causes of action may give rise to the same injury.

paid by CDKR for the tort claims covered the same injury as the damages sought for breach of contract by JCJC.

In fact, Gerber's amended complaint demonstrates that JCJC and CDKR's actions were intertwined. He states that "[d]efendants [JCJC] and CDKR agreed to communicate to VCCE that CDKR was authorized to accept Mr. Gerber's commission in 'escrow' in CDKR's trust account." Furthermore, that "Ruby, on behalf of JCJC, confirmed the false statements made by CDKR to VCCE with respect to [the tranches of tax credit sales]." Additionally, "[d]efendants JCJC and CDKR made materially false statements to VCCE to induce its breach of the express terms of the Payment Direction [L]etter[.]"

Because JCJC and CDKR's conduct deprived Gerber of his commission, they caused the same injury, regardless of cause of action or timing.

III. JCJC met its burden when moving for the offset.

Gerber argues that JCJC did not meet its burden on its Motion because—other than believing that JCJC's argument was incorrect—JCJC did not present new evidence at the post-trial hearing. We disagree.

Under Code § 8.01-35.1, "[a] party who wishes to obtain credit for a plaintiff's prior receipt of payment for the same injury from another co-defendant is required to make a motion, and bears the burden on that motion." *William H. Gordon Assocs. v. Heritage Fellowship*, 291 Va. 122, 146 (2016) (citing *Acordia of Va. Ins. Agency v. Genito Glenn, L.P.*, 263 Va. 377, 389 (2002)). Furthermore, "[a] release or covenant not to sue given pursuant to this section shall not be admitted into evidence in the trial of the matter but shall be considered by the court in determining the amount for which judgment shall be entered." Code § 8.01-35.1(A)(1).

First, Gerber asserts that JCJC did not meet its burden on its Motion because JCJC incorrectly argued that its and CDKR's injuries were distinct. As stated above, we disagree with

Gerber's assertion, as JCJC and CDKR's actions were intertwined to harm him. Second, JCJC met its burden on the motion under Code § 8.01-35.1(A)(1) by submitting—with Gerber's agreement—the Settlement Agreement for the circuit court's review at the post-trial hearing. JCJC also submitted post-trial briefing on the Motion, submitted a reply brief to Gerber's response, and argued at the post-trial hearing. Furthermore, the circuit court had five days' worth of transcript available from the jury trial for review when making its post-trial ruling; and the same judge presided over both the original jury trial and the post-trial hearing.

Because JCJC submitted the Settlement Agreement for post-trial review, in addition to the voluminous trial record, JCJC carried its burden on the motion. Beyond the requirement of producing a settlement agreement for post-trial review under this portion of the code, requiring movants to submit other evidence would, in effect, create "mini-trials," which is not the purpose of this kind of proceeding.

IV. The circuit court was not required to apportion CDKR's settlement.

Gerber argues that, in the alternative, if JCJC was entitled to an offset in damages, CDKR's settlement should have only offset a portion of that amount, and not JCJC's entire judgment. Gerber further argues it would follow that the circuit court should have calculated the monetary value of all claims against CDKR relative to the $205,000 settlement, and should have only credited JCJC for the similar harms.

To support this argument, Gerber cites *Oswald v. Holtzman*, 90 Va. Cir. 9 (Fairfax Cnty. 2015). *Oswald* involved a circuit court allocating a previous co-defendant's settlement to offset the plaintiff's judgment against the defendant under Code § 8.01-35.1. *Oswald*, 90 Va. Cir. at 14. The *Oswald* court found that "[w]hen . . . the release given to a joint tortfeasor covers more than a single injury, *the [c]ourt must decide* the extent to which the amount paid under the release duplicates an element of damage awarded to a plaintiff against the non-settling tortfeasor." *Id.* at 15 (emphasis added) (citing *Acordia of Va. Ins. Agency*, 263 Va. at 389-90). Although, as a circuit court case, *Oswald* may be cited as persuasive authority, we note that *Oswald* relies on *Acordia* to support its ruling on apportionment. *Acordia* held that the trial court "must look at the injury or damage covered by the release and, if more than a single injury, allocate, *if possible*, the appropriate amount of compensation for each injury." *Acordia of Va. Ins. Agency*, 263 Va. at 389 (emphasis added) (quoting *Tazewell Oil Co.*, 243 Va. at 115). Here, the circuit court concluded that Gerber's injuries from his tort claims against CDKR were the same as the breach of contract injuries by JCJC, so there was not more than a single injury that would trigger the need for the court to consider whether such an apportionment was necessary or possible.[11]

V. Gerber waived his computer fraud claim against CDKR.

Related to his argument that CDKR's settlement payment should have been apportioned according to his claims' relative value, Gerber also asks this Court to consider the difference between his computer fraud claim against his other claims with CDKR. Specifically, Gerber states that his computer fraud claim is distinct because it allows for "any damages sustained," which includes lost profits and the costs of suit (including attorney fees).[12]

Although these remedies may have been available to Gerber and are distinct from the remedies under his other claims, he does not address the circuit court's finding on this claim.

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[11] Additionally, the circuit court's decision to completely offset JCJC's entire judgment by CDKR's settlement, without an apportionment of claims to monetary value, is presumed correct because "the well-established principle [is] that all trial court rulings come to an appellate court with a presumption of correctness." *Wynnycky v. Kozel*, 71 Va. App. 177, 192 (2019) (quoting *Stiles v. Stiles*, 48 Va. App. 449, 453 (2006)). Furthermore, "[t]he trial court is presumed to know and correctly apply the law 'absent clear evidence to the contrary in the record.'" *Rainey v. Rainey*, 74 Va. App. 359, 377 (2022) (quoting *Milam v. Milam*, 65 Va. App. 439, 466 (2015)).

[12] Code § 18.2-152.3 (elements of a computer fraud claim). On brief, Gerber does not cite to anywhere in the Code where he would be entitled to civil relief for computer fraud.

When making its oral ruling, the circuit court found that Gerber's computer fraud claim against CDKR did not "state[] a cause of action recognized under the law," and so it vacated that claim as well as the default judgment related to that claim.[13]

Gerber does not address the circuit court's dismissal of the computer fraud claim, and so he cannot now ask this Court to take it into consideration, consider it a separate injury, and apportion its relative value against CDKR's settlement. According to the Rules of the Supreme Court of Virginia, an appellant's brief must include "[t]he standard of review *and the argument* . . . relating to each assignment of error." Rule 5A:20(e) (emphasis added). "[W]hen a party's 'failure to strictly adhere to the requirements of Rule 5A:20(e)' is significant, 'the Court of Appeals may . . . treat a question presented as waived.'" *Parks v. Parks*, 52 Va. App. 663, 664 (2008) (quoting *Jay v. Commonwealth*, 275 Va. 510, 520 (2008)).

Because Gerber did not address the circuit court's finding about his computer fraud claim—which was dismissed when the default judgment was vacated—he cannot now ask this Court to consider the difference between the computer fraud claim among the remaining claims as a separate injury, and to consider the computer fraud claim's value within CDKR's settlement.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.

[13] The circuit court's post-trial order did not explicitly reference its ruling on the computer fraud claim, but the order stated that the court's oral finding was incorporated into the written order.