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Jan 18 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
COURT OF COMMON PLEAS
EDGAR W DICKSON, CIRCUIT COURT JUDGE

Appellate Case No. 2022-001070

Rosen Hagood, LLC, ...Respondent/Appellant,

v.

Albert T. Henson, Jr., ...Appellant/Respondent,

INTIAL RESPONSE BRIEF OF APPELLANT

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ALBERT T. HENSON JR.

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STATEMENT OF ISSUES ON APPEAL[1]

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II. The Trial Court did not err as a matter of law in denying Rosen Hagood's request for an award of attorney's fees and costs when Rosen Hagood did not request this relief in its pleadings and did not establish it had incurred any attorney's fees.

[1] Pursuant to Rule 208(b)(2), SCACR, a Respondent may provide a separate Statement of the Issues, Statement of the Case, or Standard of Review if he is dissatisfied with that provided by the Appellant. Additionally, a Respondent is bound by the Statement of the Case as set forth by the Appellant unless he provides his own Statement of the Case. Appellant-Respondent Henson therefore provides his own Statement of the Issues, Statement of the Case, and Standard of Review. *Id.*

STATEMENT OF THE CASE

In order to fully understand the case before the Court, the Court of Appeals is requested to take judicial notice pursuant to Rule 201, SCRE. These rules are made applicable to the Court of Appeals by Rule 1101, SCRE and Rule 101 SCRE. The Court is required to take judicial notice of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201(b)(2) SCRE.

Judicial notice is mandatory when requested by a party, and the Court is supplied with the necessary information. Rule 201(d). Judicial notice may be taken at any state of the proceedings. Rule 54(c.

The actual documents of which the Court of Appeals is requested to take judicial notice are set forth in Albert T. Henson Jr.'s ("Mr. Henson's") Appellant/Respondent's Designations, filed contemporaneously with this initial brief. By way of summary, however, the records of which the Court of Appeals is requested to take judicial notice are contained in the following public records maintained by the Judicial Branch:

- *In Re: Trust EIP Created Under the Last Will and Testament of Eunice I. Page dated October 1992, Richard S. Henson and Vann Kenneth Henson v. Albert T. Henson Jr., and Julian Reid Henson,* 2016-CP-18-01849 (Dorchester County Circuit Court);
- *Albert Henson v. Julian Henson,* Appellate Case No. 2017-000095 (South Carolina Court of Appeals);
- *In Re: Trust IEP Created Under the Last Will and Testament of Eunice I. Page Dated October 14, 1992, Richard S. Henson and Vann Kenneth Henson v. Albert T. Henson*, Appellate Case No. 2018-002002;

- *Trust EIP Created Under the Last Will and Testament et al. v. Sarah Buxton*, Case No. 2021-CP-18-01226 (Dorchester County Court of Common Pleas).

While this appeal is from an order issued in Circuit Court Case No. 2020-CP-18-02003, it is necessary to examine the underlying litigation in order to understand the issues that were not disclosed to the circuit court when granting summary judgment to Respondent-Appellant Rosen Hagood LLC. When viewed in the fuller context, rather than the limited facts provided by Rosen Hagood LLC in this particular litigation, it is apparent there are genuine issues of material fact that precluded entry of summary judgment.[2]

As relevant here, it is sufficient to state that the disputes underlying the current dispute arose out of the Estate of Ann P. Pittillo, which was probated before the Dorchester County probate court as Case No. 1994-ES-18-00147-2. The later litigation in which Rosen Hagood was involved was a 2014 probate matter related to the Trust of Eunice I. Page, and later In re: Trust EIP Created Under the Last Will and Testament of Eunice I. Page October 14, 1992, when Richard S. Henson and Vann K. Henson filed suit in probate court against the current Appellant Respondent Albert T. Henson Jr. ("Mr. Henson") and Julian Reid Henson. Of the original litigants, only Appellant Respondent Albert T. Henson Jr. ("Mr. Henson") is a party to this action and this appeal.

"Eunice I. Page (Ms. Page") died on October 6, 1993, a resident of Dorchester County. Her estate was administered in the Dorchester County Probate Court, case number 1994-ES-18-147. In her Last Will and Testament (the "Will") executed on October 14, 1992, Ms. Page created the Trust EIP (the "Trust") under Item V of the Will. Her daughter, Ann P. Pittillo ("Ms. Pittillo"), was appointed as trustee of the Trust. The main asset of the Trust, real property located at 605 North Main Street in Summerville. . . was conveyed to Ms. Pittillo as trustee by deed of distribution

[2] These issues will be explored in more detail in Appellant/Respondent's Initial Appellant's Brief, for which an extension has been granted until January 27, 2023.

dated July 22, 1997. Ms. Pittillo died on April 20, 2014, a resident of Dorchester County. . . Case No. 2014-ES-18-00592, and a vacancy in trusteeship arose.[3]

"Ms. Pittillo was survived by three sons, [Mr. Henson] and . . . Richard S. Henson and Vann K. Henson. Her sons [were] the beneficiaries of the Trust. On January 21, 2015, [Richard S. Henson and Vann K. Henson] filed an action which, in part, requested the probate court to appoint them as successor co-trustees of the Trust or to dissolve the Trust and distribute 605 North Main to the Trust's designated beneficiaries. Mr. Henson filed responsive pleadings, including counterclaims, and maintained that he was the owner of the Property. . .

"After years of litigation, the probate court filed an Order on March 4, 2020 granting summary judgment in favor of [Richard S. Henson and Vann K. Henson] as follows: . . . (2) on the issue of the ownership of the Property, the probate court granted summary judgment in favor of [Richard S. Henson and Vann K. Henson] that the Trust owned the Property, not [Mr.] Albert Henson; (3) on [Mr.] Albert Henson's claim that he owned an equitable interest in the Property, judgment was again rendered in favor of [Richard S. Henson and Vann K. Henson] and [Mr.] Albert Henson's equitable interest claim was barred; (4) on [Mr.] Albert Henson's claims of quantum meruit and unjust enrichment, judgment was rendered in favor of [Richard S. Henson and Vann K. Henson] and [Mr.] Albert Henson was denied relief on such claims; and (5) on [Mr.] Albert Henson's claim of adverse possession, judgment was again rendered in favor of [Richard S. Henson and Vann K. Henson] and [Mr.] Albert Henson was also denied this relief as a matter of law. With respect to [Mr.] Albert Henson's claim of set-off for costs and expenses he had spent on the Property since 1988, the probate court granted [Richard S. Henson and Vann K. Henson]'s

[3] Quote taken from page 1 of Brief of Respondents Richard S. Henson and Vann K. Henson in Case No. 2021-CP-18-01226 (Dorchester County Court of Common Pleas). This particular document is not designated for inclusion in the Record on Appeal because its relevance to the issues on appeal is tangential at best. Attribution, however, is provided here.

motion for summary judgment as to such costs and expenses paid prior to the death of Ms. Pittillo and denied the motion for costs and expenses paid after Ms. Pittillo's death. . .

"The[se] remaining issues, and other estate-related issues, were set for trial. In lieu of trial, however, the parties settled all outstanding issues and placed the settlement on the record on March 9, 2020, confirmed by the Order Approving Settlement filed on April 1, 2020. . ."

The instant action was initiated on December 16, 2020 when Respondent-Appellant Rosen Hagood LLC filed suit against Mr. Henson seeking recovery under four causes of action: breach of contract, "money had and received," constructive trust and declaratory judgment (seeking a security interest in [Mr. Henson's] in the real property of the Trust EIP located at 605 North Main Stret, Summerville by virtue of the terms of the above trust." (Complaint filed December 16, 2020 in Case No. 2020-CP-18-2003).

The complaint in this action did not seek an award of prejudgment interest nor did it request an award of attorney fees. *Id.* The complaint was never amended nor supplemented. The complaint did not contain, nor did it incorporate any fee agreement between Albert T. Henson Jr. and Rosen Hagood.

Albert T. Henson Jr. appeared *pro se* and opposed the relief sought by Rosen Hagood.

Rosen Hagood moved for summary judgment on April 7, 2022. (Motion for SJ filed April 7, 2022, Case No. 2020-CP-18-02003). The motion did not state on which cause of action summary judgment was sought, nor did it request prejudgment interest or attorney's fees. *Id.* In support of the motion, Rosen Hagood referenced the pleadings in the case, as well as "Affidavit of Plaintiff – Exhibit 1. . . Deposition testimony of the Defendant – Exhibit 2 and Defendant's Admission as to the genuineness of the representation letter – Exhibit 3." *Id.*

Mr. Henson filed opposition to the motion, and included as exhibits his own affidavit, his deposition, a bill from Duggan Wynn Law Firm and an email from Brian Duffy. (Opposition to Motion for Summary Judgment filed May 31, 2022, Case No. 2020-CP-18-2003).

A hearing was held on the Motion for Summary Judgment on June 2, 2022. (Order granting Summary Judgment filed June 30, 2022, Case No. 2020-CP-18-02003). The trial judge granted summary judgment in favor of Rosen Hagood without stating on which cause of action the judgment was granted. *Id.* The trial judge found "no reference to [Mr. Henson] being responsible for interest accrued on unpaid fees" and "deny[ed] Plaintiff's Request for $57,083.46 in accrued interest." *Id.* The trial judge also denied Rosen Hagood's prayer for attorney fees. Lastly, the trial judge found Rosen Hagood was not entitled to recover for attorney fees the firm billed for work done after the firm was relieved as counsel for Mr. Rosen on November 25, 2019. The trial judge, relying on "Exhibit B of Plaintiff's Motion"[4] granted judgment against Mr. Henson in the amount of $158,369.96. . ." *Id.*

Rosen Hagood did not file a motion seeking reconsideration of the trial judge's order. Rosen Hagood filed a notice of cross appeal on August 4, 2022.

[4] The trial judge's reference was actually to Exhibit B of Exhibit 1 to the motion for summary judgment, *i.e.,* the affidavit of Daniel F. Blanchard III. Mr. Blanchard's affidavit was Exhibit 1 to the motion, and the ledger to which the trial judge referenced was Exhibit B to Mr. Blanchard's affidavit. The ledger reflects an outstanding balance of $158,369.96 due on November 16, 2019, with another $3,302.50 billed after Rosen Hagood was relieved as counsel to Mr. Henson. (Affidavit of Daniel F. Blanchard III dated, Exhibit 1 to Motion for Summary Judgment; Exhibit 2 to Affidavit of Daniel F. Blanchard III, a ledger dated November 24, 2020 showing a balance due through December 27, 2019.

ARGUMENTS

ISSUES ONE AND TWO

I. The Trial Court did not err as a matter of law in denying Rosen Hagood's request for an award of prejudgment interest when Rosen Hagood never sought this relief in the pleadings.

II. The Trial Court did not err as a matter of law in denying Rosen Hagood's request for an award of attorney's fees and costs when Rosen Hagood did not request this relief in its pleadings and did not establish it had incurred any attorney's fees.

In its brief, Rosen Hagood asserts the trial court erred in failing to award prejudgment interest on the attorney's fees it was seeking to collect from Mr. Henson and in failing to award attorney's fees incurred by Rosen Hagood in pursuing this action against Mr. Henson. Rosen Hagood is prevented from asserting these issues on appeal by numerous procedural bars. Additionally, on the merits of both issues, Rosen Hagood has not established a right to recover either prejudgment interest or attorney's fees.

In its initial brief, Rosen Hagood states "[a]t the hearing, Rosen Hagood provided the Court with detailed entries showing the $161,671.96 in attorney's fees and costs provided to Henson in the underlying Probate Court litigation. . . Rosen Hagood also provided a summary sheet itemizing the calculation of the accrued prejudgment interest on the amounts owed, which interest totaled $57,083.46, as well as an affidavit of counsel supporting the attorney's fees and costs incurred in this suit to collect the payments owed by Henson. . ." (Initial Brief Respondent Appellant, p. 4).[5]

[5] Rosen Hagood's initial Respondent-Appellant's brief cites to "Interest Sheet, Affidavit of Plaintiff's Attorney" but neither are a part of the record below. At the hearing, counsel for Rosen Hagood stated, "I kept my attorney's time and I have an affidavit which I will hand up to the Court today or I'll file it electronically later today." (Transcript p. 12, lines 8-10). However, the affidavit is not a part of the record before the trial court. *See* link in following paragraph. Mr. Henson objects to the designations of Rosen Hagood which are to matters that were not before the trial court. Rule 210(c), SCACR. This issue is discussed more fully in Mr. Henson's Designation of Matter.

The trial court's docket does not reflect the introduction of or filing of any of the documents described by Rosen Hagood in its initial brief, other than the ones which were filed with the Motion for Summary Judgment.

https://publicindex.sccourts.org/Dorchester/PublicIndex/CaseDetails.aspx?County=18&CourtAgency=18002&Casenum=2020CP1802003&CaseType=V&HKey=1139883102687397831188777683735178476857898057877710099109116828871661191227012111866117908576 77.

The transcript confirms no exhibits were introduced during the hearing. (Transcript dated June 1, 2022, pp. 1-2).

More importantly, Rosen Hagood's complaint did not seek an award of prejudgment interest or attorney's fees. A party may not normally receive relief which is not set forth in the pleadings. *Pittman Mortgage Company Inc. v. Edwards*, 327 S.C. 72, 488 S.E.2d 335 (1997); *Parker Peanut Co. v. Felder*, 207 S.C. 63, 34 S.E.2d 488 (1945).

This Court has liberally construed the rule in some cases to permit relief not requested in the complaint only in family court, where equity requires a different application of the rules.[6] *Meehan v. Meehan*, 407 S.C. 471, 756 S.E.2d 398 (Ct.App. 2014); *Reid v. Reid*, 280 S.C. 367, 312 S.E.2d 724 (Ct.App. 1984).

Arguably, Rosen Hagood could have made a motion to amend its pleadings to conform to the evidence under Rule 15(b), SCRCP, if it in fact introduced evidence at the hearing regarding prejudgment interest and/or attorney fees incurred. However, the transcript of the hearing held on June 2, 2022, does not reflect that any evidence was introduced. (Transcript of Proceedings June 1, 2022, pp. 1-2).

[6] The Supreme Court's adoption of the SCRCP to family court proceedings excludes the application of Rule 54(c) to the "extent it permits the court to grant relief not requested in the pleadings." Rule 2(a), South Carolina Rules of Family Court. *South Carolina Department of Social Services v. Smith*, 419 S.C. 301, 797 S.E.2d 740 (Ct.App. 2019), *rev'd on other grounds* 423 S.C. 60, 814 S.E.2d 148 (2018).

More importantly, by failing to file a motion for reconsideration, Rosen Hagood failed to preserve either the issue of prejudgment interest or attorney's fees for consideration on appeal. *Kitchen Planners LLC v. Friedman*, 432 S.C. 267, 851 S.E.2d 724 (Ct.App. 2020).

Lastly, Rosen Hagood filed its Motion for Summary Judgment on April 7, 2022, supported by an affidavit of Edward Blanchard, the attorney who represented Mr. Henson while Mr. Henson was a client of the law firm. (Affidavit of Blanchard dated April 7, 2022). While Mr. Blanchard's affidavit contained exhibits, it did not contain any exhibit which suggested Rosen Hagood was seeking to recover prejudgment interest or attorney fees. To the contrary, Mr. Blanchard's affidavit included Exhibit B, the firm's "Tabs3 Client Ledger Report" which showed Mr. Henson was never charged with interest during the entire time he was a client of the law firm. Mr. Blanchard's affidavit (Exhibit 1 to the Motion for Summary Judgment) also included as Exhibit A, a copy of a letter which Rosen Hagood contends is the contract between Mr. Henson and the law firm. Exhibit A, which is four (4) pages long, covers many topics, but none of them authorize Rosen Hagood to charge prejudgment interest on unpaid attorney fees. (Exhibit A to Blanchard Affidavit). Indeed, the only consequence set forth in the letter is that if the client's account becomes delinquent "for more than sixty (60) days, we may move to be relieved as your counsel." *Id.* page 3.[7]

Rule 56(a), SCRCP permits a party to file a motion for summary judgment with or without supporting affidavits. Here, Rosen Hagood LLC elected to support its motion for summary judgment with an affidavit which established that Rosen Hagood never attempted to bill Mr. Henson

[7] The letter upon which Rosen Hagood relies for its contractual right to recover attorney's fees does, in fact, include language which permits Rosen Hagood to seek to be "reimburs[ed] us for all costs incurred in collecting these amounts, including reasonable attorney's fees and costs." However, the complaint did not include a claim for this relief, as discussed above.

for prejudgment interest.[8] While the transcript reflects that Rosen Hagood made a request for prejudgment interest during the hearing, no exhibits were introduced. (Transcript p. 11). During the hearing, counsel for Rosen Hagood said he had calculated "the interest, since the last bill was sent to Mr. Henson" but no documents were introduced in support of the calculation of interest. (Transcript pp. 1-2). The Clerk of Court's file contains no exhibits or filings from the date of the hearing.[9]

Similarly, Counsel for Rosen Hagood's statement that he had "kept my attorney's time and I have an affidavit which I will hand up to the Court today or I'll file it electronically later today" (which did not happen) does not state that the firm incurred any attorney's fees or costs in pursuing the action against Mr. Henson. Both appellate courts have held that when the triggering language for recovery of attorney's fees requires that the attorney's fees actually be incurred before they can be recovered in an action for collection, the party seeking to collect attorney's fees must show that the fees were actually incurred and owed. *Williamson v. Middleton*, 383 S.C. 490, 495-96, 681 S.E.2d 867, 870-71 (2009); *See also South Carolina Department of Social Services v. Mary C.*, 396 S.C. 15, 720 S.E.2d 503 (Ct.App. 2011).

There is no authority for recovery of attorney's fees in a collection action when the Plaintiff is *pro se* and actually incurs no attorney's fees in pursuing its claim. Rosen Hagood "keeping track" of the time it spent in pursuing this action does not constitute Rosen Hagood "incurring" attorney's fees for which it may seek relief against Mr. Henson. (Exhibit A to Affidavit of Blanchard).

[8] A party opposing summary judgment may serve opposing affidavits in opposition to summary judgment "not later than two days before the hearing." Rule 56(c), SCRCP. Mr. Henson did so. (Opposition to Summary Judgment dated May 31, 2022, with affidavit of Albert Hinson).

[9] It is unclear whether the hearing was held on June 1, 2022 or June 2, 2022. The transcript is dated June 1, 2022, but the trial court's order recites that the hearing was on June 2, 2022. (Order granting Summary Judgment).

Rosen Hagood is prohibited from obtaining relief from this court in its claim for prejudgment interest or attorney's fees, because neither was sought in the complaint, the complaint was not amended at any time to include these claims, no motion for reconsideration was filed preserving these issues for appeal.

Substantively, there is no evidence that Rosen Hagood ever charged Mr. Henson prejudgment interest nor is there any evidence that Rosen Hagood actually incurred any attorney's fees in bringing this action, when the contractual term upon which Rosen Hagood relief for a claim for attorney's fees requires proof that the attorney's fees were actually incurred.

These issues are without merit and should not be addressed on appeal. Even if addressed, the arguments fail on the substantive grounds asserted.

CONCLUSION

This Court should not address any of the issues raised by Rosen Hagood in its cross-appeal because (1) the complaint did not seek this relief; (2) no motion for reconsideration was filed seeking to preserve these issues for appeal; and (3) Rosen Hagood failed in its proof on the merits that it was entitled to recover prejudgment interest or attorney's fees.

Except for those issues raised by Mr. Henson in his Appellant Respondent's Initial/Final Brief, the decision of the trial court should be affirmed.

Respectfully submitted,

s/ Desa Ballard

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January 3, 2023

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Jan 18 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
COURT OF COMMON PLEAS
EDGAR W DICKSON, CIRCUIT COURT JUDGE

Appellate Case No. 2022-001070

Rosen Hagood, LLC, ... Respondent/Appellant,

v.

Albert T. Henson, Jr., ... Appellant/Respondent,

PROOF OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on January 18, 2023, I served a copy of the **Corrected Initial Response Brief of Appellant/Respondent** in the above-captioned case on the following individuals by electronic mail using their email address listed in the Attorney Information System, addressed as follows:

F. Truett Nettles II, Esquire
Rosen Hagood LLC
tnettles@rosenhagood.com

Beth Cogan

Beth Cogan, Paralegal

January 18, 2023
West Columbia, South Carolina

Beth Cogan

From: Beth Cogan
Sent: Wednesday, January 18, 2023 4:32 PM
To: F. Truett Nettles II
Cc: Desa Ballard; Haley Hubbard
Subject: (Rosen Hagood, LLC v. Albert T. Henson, Jr. 2022-001070) Ltr to COA correcting Deficiency Initial Response Brief of Appellant/Respondent
Attachments: 2023 01 18 Ltr to COA encl Corrected AIB.pdf; 2023 01 18 Initial Respondents Brief of Appellant Respondent (corrected).pdf; 2023 01 18 POS Corrected Initial response brief of AR.pdf

Mr. Nettles,
Please see the attached letter and Initial Respondents Brief of Appellant Respondent that is being filed today to correct the deficiency.

Kindest Regards,
-Beth

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January 18, 2023

Via Email (ctappfilings@sccourts.org)
The Honorable Jenny Abbot Kitchings
Court of Appeals Clerk of Court
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Rosen Hagood, LLC v. Albert T. Henson, Jr.*
Appellate Case No.: 2022-001070

Dear Ms. Kitchings:

We are in receipt of your deficiency letter dated January 18, 2023, advising the brief must contain a cover in compliance with Rule 267, SCACR in the above-referenced matter. We have corrected that deficiency and the **Initial Response Brief of Appellant/Respondent** is enclosed for filing. By copy of this letter and as evidenced by the Proof of Service, these filing has been served upon counsel for the Respondents. Thank you for your time in this matter. If you have any questions, please do not hesitate to contact our office.

With warm personal regards, I am,

Sincerely yours,

s/*Desa Ballard*

Desa Ballard
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Enclosures

cc: *Via Email*
F. Truett Nettles II, Esquire
Al Henson