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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of
Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Mark J. Hayes, Circuit Court Judge

Case No. 2022-001826

Carolina Real Estate Holdings, LLC, Appellant,

v.

Brilin Electric, LLC and W & L Services, LLC, Defendants,

Of Which Brilin Electric, LLC is the Respondent.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES....3
STATEMENT OF THE CASE....4
STATEMENT OF FACTS....5
STANDARD OF REVIEW....15
ARGUMENT....16
I. BECAUSE APPELLANT DID NOT MOVE FOR DIRECTED VERDICT ON THE ISSUE OF ACTUAL DAMAGES, THIS ISSUE IS NOT PRESERVED FOR APPELLATE REVIEW. 17
II. BECAUSE THERE IS SUFFICIENT EVIDENCE FOR A JURY TO CONCLUDE THAT THERE WAS A PATTERN OF BEHAVIOR BY APPELLANT, THE PUBLIC INTEREST PRONG IS SATISFIED AND THE LOWER COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JNOV. 19
III. THE TRIAL COURT CORRECTLY FOUND RESPONDENT TO BE THE PREVAILING PARTY FOR PURPOSES OF AWARDING ATTORNEY'S FEES. .20
IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING HOW MUCH TO AWARD RESPONDENT IN ATTORNEY'S FEES. 22
V. THIS COURT SHOULD SUMMARILY AFFIRM THE TRIAL COURT PURSUANT TO RULE 220(c) OF THE SOUTH CAROLINA RULES OF APPELLATE PROCEDURE. 24
CONCLUSION....25

TABLE OF AUTHORITIES

Allegro, Inc. v. Scully, 418 S.C. 24, 791 S.E.2d 140 (2016) 15

Blumberg v. Nealco, 310 S.C. 492, 427 S.E.2d 659 (1993) 21

Chestnut v. AVX Corp., 413 S.C. 224, 776 S.E.2d 82 (2015) 24

D.A. Davis Constr. Co. v. Palmetto Props., Inc., 281 S.C. 415, 315 S.E.2d 370 (1984) 16

Ducharme v. Madewell Concrete, LLC, No. 6:20-1620-HMH, 2021 U.S. Dist. LEXIS 118904 (D.S.C. June 25, 2021) 22

EFCO Corp. v. Renaissance on Charleston Harbor, LLC, 370 S.C. 612, 635 S.E.2d 922 (Ct. App. 2006) 20

Gastineau v. Murphy, 331 S.C. 565, 503 S.E.2d 712 (1998) 15

Heath v. Cty. of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990) 20

Horton v. Jasper Cty. Sch. Dist., 423 S.C. 325, 815 S.E.2d 442 (2018) 16, 21, 24

Jefferies v. Phillips, 316 S.C. 523, 451 S.E.2d 21 (Ct. App. 1994) 19

Jolly v. GE, 435 S.C. 607, 869 S.E.2d 819, 865 S.E.2d 12 (Ct. App. 2021) 15

Maybank v. BB&T Corp., 416 S.C. 541, 787 S.E.2d 498 (2016) 23

RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P., 399 S.C. 322, 732 S.E.2d 166 (2012) 16,19

Rule 220(c), South Carolina Rules of Appellate Procedure 16, 24

S.C. Code Ann. § 39-5-140(a) 16

Singleton v. Stokes Motors, Inc., 358 S.C. 369, 595 S.E.2d 461 (2004) 18

State ex rel. Wilson v. Ortho-Mcneil-Janssen Pharm., 414 S.C. 33, 777 S.E.2d 176 (2015) .15, 17

Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994) 15

Taylor v. Nix, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992) 22

Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) 16

STATEMENT OF THE CASE

On March 27, 2020, Appellant initiated this case by filing a Complaint in the Sixteenth Judicial Court of Common Pleas against Respondent (the "Complaint"). (R. p. 20). The Complaint alleged both negligence and gross negligence, and breach of contract. In response, Respondent filed an Answer and Counterclaims on May 29, 2020 (the "Answer"). (R. p. 39). The Answer asserted a variety of Affirmative Defenses and Counterclaims for breach of contract, breach of the Implied Covenant of Good faith and Fair Dealing, Quantum Meruit/Unjust Enrichment, and Unfair Trade Practices Act Violation ("UTPA"). Appellant filed an Amended Complaint (the "Amended Complaint") against Respondent and W&L Services, LLC on June 25, 2020. (R. p. 62). Defendant W&L Services, LLC is not a party to this instant appeal. Respondent filed an Answer to the Amended Complaint and Counterclaims on July 27, 2020, which alleged the same counterclaims as the Answer. (R. p. 85). Appellant filed a Reply to Counterclaims on August 25, 2020. (R. p. 108). A Consent Order of Dismissal as to Defendant W&L Services, LLC was entered on January 7, 2022. (R. p._).

A jury trial was held from July 18, 2022 to July 21, 2022 before the Hon. J. Mark Hayes, II in York, South Carolina. (R. p. 150). At the conclusion of the trial on July 21, 2022, the rendered the verdict was as follows: (1) for the Appellant on the breach of contract claim in the amount of $10,513.88; (2) for the Respondent on its breach of contract counterclaim in the amount of $4,424.75; and (3) for the Respondent on its UTPA counterclaim in the amount of $6,089.13. (R. p. 16). The verdict on Appellant's breach of contract claim, and the verdicts of Respondent's counterclaims were equal in value.

On August 2, 2022, Respondent filed a motion and affidavit for attorneys' fees. (R. p. 142). On August 17, 2022, Appellant filed a motion and affidavit for attorneys' fees. (R. p. 147).

A hearing was held on the merits of both post-trial motions on September 13, 2022. (R. p. 800). The Order on Post-Trial Motions was filed on December 9, 2022. (R. p. 8). The Order on Post-Trial Motions granted Respondent treble damages for its UTPA claim in the amount of $18,267.99, attorneys' fees in the amount of $58,879.55, and costs of $3,553.05, with a total award of $80,700.59. (R. p. 11).

Appellant filed a Notice of Appeal on December 30, 2022. On March 9, 2023, Appellant filed an Amended Notice of Appeal that included the jury verdict.

STATEMENT OF FACTS

The Lease.

On or about April 17, 2017, Carolina Real Estate Holdings, LLC (the "Appellant") and Brilin Electric, LLC (the "Respondent") (collectively referred to as, the "Parties") entered into that certain Lease Agreement (the "Lease"). The Lease was for real property located at 2180 Carolina Place Dr., Suite 111, Fort Mill, SC 29715 (the "Premises"). (Pl. Trial Ex.[1] 2). (R. pp. 880-893). The Lease contained a three-year term commencing on the date of May 1, 2017, and ending on April 30, 2020. *Id*. (R. p. 880). The lease enumerated several obligations for both parties. Most relevant for the instant case are Paragraph 10 (Repairs by Landlord); Paragraph 11 (Repairs by Tenant); Paragraph 12 (Alterations); Paragraph 21 (Quiet Enjoyment); and Paragraph 28(g) (Attorneys' fees to prevailing party). *Id*. (R. p. 884; 885; 889; 893).

In the beginning of the Lease's term, Appellant and Respondent generally had a peaceful relationship with the Appellant describing the Respondent as "reasonable." [Trial Tr.[2] pp. 69-70]. (R. pp. 218-219). However, communication began to breakdown and the relationship

[1] The term "Plaintiff" will be abbreviated as "Pl." throughout.
[2] The word "transcript" will be abbreviated as "Tr." throughout.

between the Parties began to sour. [Trial Tr. pp. 70-71]. (R. pp. 219-220). As a result, the Appellant engaged an attorney to send out a letter via certified mail [Trial Tr. p. 72]. (R. p. 221). The letter, dated September 24, 2019, pointed out alleged issues with the Premises that needed to be repaired and declared the lease in default. [Pl. Ex. 3]. (R. pp. 894-896). Additionally, the letter demanded that Respondent stop operating any forklifts or other heavy machinery effective immediately. *Id*. (R. p. 896).

After multiple communications between the parties, the Parties engaged in a meeting on October 31, 2019, on the Premises, where they came up with a punch list of repairs that needed to be done by the time Respondent moved out. [Trial Tr. p. 468]. (R. p. 644). Respondent had the understanding that the Parties would be "fine and good," provided that the punch list items were taken care of prior to move out. [Trial Tr. p. 468]. (R. p. 644).

Filing of Lawsuit and Subsequent Trial

Prior to the end of the Lease term, Appellant filed a lawsuit against Respondent on March 27, 2020. (R. p. 20). Respondent filed an Answer with Counterclaims on May 29, 2020, generally denying the allegations contained in the Complaint and asserting counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of the Unfair Trade Practices Act (the "UTPA"). (R. p. 39). Both the Complaint and the Answer and Counterclaims were subsequently amended. (R. pp. 62; 85).

The case was called for a jury trial before the Hon. J. Mark Hayes II on July 18, 2022. The Appellant's case-in-chief and cross-examination consisted of the introduction of various exhibits showing damage to the Premises that it attributed to the Respondent and various overinflated quotes to fix said damage. [Pl. Trial Exs. 3-27]. (R. p. 894-953). Additionally,

Appellant called the owner of Appellant (Brad Decker), an employee of Appellant (Wayne Schulte), a structural engineered hired by Appellant to examine the Premises (John Abernathy) and a general contractor who performed repairs to the Premises at the behest of Appellant (Mark Robinson). These witnesses testified about the Lease and opined that the damages alleged to be attributable to the Respondent constituted breaches of the Lease.

Respondent, during its case-in-chief and cross-examination, introduced various photographs of the Premises and quotes for services to repair damage to the Premises. [Def. Ex. 1-9; 16-17]. (R. pp. 954-971). Unsurprisingly, the quotes provided by Respondent were much lower in price than the quotes provided by the Appellant. Compare *Id*. with Pl. Exs. 6, 9, 10, 12, 17, 18, and 19. (R. pp. 919; 924; 925; 928; 934; 935; 936). Respondent also introduced an email chain between Respondent and Appellant's counsel, where Respondent was attempting to remedy any alleged damage and arrange a walkthrough to review the damage. [Def. Ex. 14]. (R. p. 978-1001). Additionally, Respondent introduced witnesses that included the owner of the Respondent (Byron Russell), an employee of the Respondent (Craig King), the owner of Southern Fireplace and Garage (Jim Hemphill), and an employee from McGee Brothers Masonry (Bill Broadway). (R. pp. 613; 564; 546; 446).

The Unfair Trade Practices Claim

The relevant claim to the issues presented before this Court is Respondent's Counterclaim for a violation of the South Carolina Unfair Trade Practices Act. After Appellant filed its lawsuit, Appellant's counsel demanded all communications occur through the attorneys. [Def. Ex. 14]. (R. p. 1000). Since the allegations contained in the Complaint consisted of repairs to various aspects of the Premises and because Appellant's counsel demanded all communications go through the attorneys, Respondent's counsel was put in the incredibly unique position of a de

facto general contractor attempting to fix punchlist items while interfacing with Appellant's designated representative – Appellant's attorney. *Id.* (R. p. 1000). As evidenced by the substantial correspondence between counsel demonstrated in Def. Exhibit 14, it is clear that much of Respondent's counsel's efforts to resolve the alleged issues was, in reality, non-legal work such as interacting with contractors, getting quotes, requesting Landlord's permission to do certain repairs per the Lease. In short, none of these actions by Respondent's counsel constituted the practice of law.

In furtherance of Respondent's assertion that Appellant was engaging in unfair trade practices, Respondent pointed to the price differences between the quotes it entered and the Appellant entered into evidence. The relevant quotes are as follows:

(1) Asphalt Quotes. Appellant presented to the jury a quote dated February 11, 2020 for asphalt repair in the amount of $5,950.00 to patch an area in the parking lot that Appellant attributed to Respondent's commercially reasonable use of a forklift. [Trial Tr. pp. 90, 144; Pl Trial Ex. 6]. (R. pp. 239; 293; 919-921). It should be further noted that Appellant was aware of the forklift's usage. [Trial Tr. p. 143]. (R. p. 292). Furthermore, the asphalt invoice states that repair made was to be a three-inch surface course with hot mix asphalt, which was deeper and more labor-intensive than the original paving. [Pl Trial Ex. 6; Trial Tr. p. 156]. (R. pp. 919-921; 305).

Respondent introduced the August 1, 2019 paving invoice form Countywide Commercial, showing that the remainder of parking lot was a two-inch hot asphalt mix. [Def. Trial Ex. 7]. (R. p. 966-968). Additionally, Respondent introduced a quote from SMI Paving, showing a total charge of $2,900.00 for a two- and one-half inch hot mix asphalt. [Def. Trial Ex. 8]. (R. p. 969-970). The SMI Paving quote was less than half of what the Appellant provided and the same quality as the original paving.

(2) Brick Work Quotes. Appellant introduced a quote from B. Phillemon, LLC dated February 20, 2020, to replace broken brick on the building above the overhead door. [Pl. Trial Ex. 9]. (R. p. 924) The quoted amount for the work to be performed was $1,600.00. [Pl. Trial Ex. 9]. (R. p. 924) The work was never performed. [Trial Tr. p. 195]. (R. p. 344).

Respondent introduced an invoice dated May 15, 2020 by McGee Brothers Company, Inc. for broken brick repair at the garage door. [Def. Trial Ex. 4]. (R. p. 962). The invoiced amount was $280.00, $1,320 less than the Appellant's quote. [Def. Trial Ex. 4]. (R. p. 962) The quote was paid by Respondent. [Trial Tr. p. 524]. (R. p. 673).

(3) Garage Door Quotes. Appellant introduced a "Quotation" by Overhead Door Company of Charlotte dated March 5, 2020, with an expiration date of April 4, 2020, to replace overhead doors on the building. [Pl. Ex. 10]. (R. p. 925-926) The total quote for the job was $7,913.51. [Pl. Ex. 10]. (R. p. 925). The quote was never actualized as the work was not performed. [App. Br. p. 10]. (R. p. 216-217).

Respondent introduced a quote from Southern Fireplace and Garage ("Southern"), dated April 15, 2020, to replace the overhead doors. The quoted price was $4,943.00, which is approximately $3,000 cheaper than the quote provided by Appellant. [Def. Ex. 1]. (R. p. 954). The replacement overhead doors, which matched the other doors on the building, were installed by Southern and the invoice was paid by Respondent. [Trial Tr. pp. 401-402]. (R. pp. 550-551).

(4) Ductwork Repair Quote. Appellant introduced an invoice from MTB Mechanical dated December 28, 2018 in the amount of $2,625.00 for duct work repairs in the Premises. [Pl. Trial Ex. 12]. (R. p. 929). This was accompanied by an invoice dated May 2, 2018 billed to Brilin Electric, LLC. [Pl. Trial Ex. 12]. (R. p. 928). This work has yet to be performed. [Trial Tr. 214]. (R. p. 363).

Respondent completed the ductwork, so no quote was necessary on its end. [Trial Tr. 501]. (R. p. 650).

(5) Drywall/Paint Estimate. Respondent produced an "estimate" for drywall repairs dated March 13, 2020. [Def. Trial Ex. 9]. (R. p. 924). The document was provided by Decker Inspections and Contracting Services, Inc. and listed a total due of $2,700.00 for the repair of drywall in warehouse area and painting of office area. [Def. Trial Ex. 9]. (R. p. 924). It is notable that Decker Inspections and Contracting Services, Inc. is owned by the principal of the Appellant. [Trial Tr. p. 63]. (R. p. 212). Appellant did not produce any documents relating to drywall or a paint estimate.

These multiple instances of Appellant providing overinflated and fraudulent invoices established the basis for Respondent's UTPA counterclaim. [Trial Tr. pp. 546-549]. (R. p. 695-698).

Motions For Directed Verdict

Both parties moved for directed verdicts at after each party's case-in-chief. [Trial Tr. pp. 367-389, 542-551]. (R. pp. 516-538; 691-700). The lower court granted the Defendant's Motion For Directed Verdict as to the allegations of negligence and gross negligence against the Respondent, the allegation of civil conspiracy against Respondent, and the allegation of fraudulent misrepresentation as to Respondent. [Trial Tr. pp. 390-396]. (R. pp. 539-545).

Appellant moved for directed verdict on the basis that Respondent failed to prove that the unfair and deceptive acts affected a public interest, but failed to make a motion with respect to the insufficiency of evidence of damages presented by Respondent during its case-in-chief. [Trial Tr. pp 542-545]. (R. pp. 691-694). The lower court denied Appellant's Motion For Directed Verdict as to Respondent UTPA's counterclaim. [Trial Tr. p. 562]. (R. p. 711).

Closing Arguments

Prior to the presentation of closing argument, the Parties stipulated that Respondent did not receive its $3,000.00 security deposit from Appellant. [Trial Tr. p. 563]. (R. p. 712).

Appellant went first in its closing arguments as to its remaining breach of contract claim. Through the Appellant's closing argument, Appellant referenced various portions of the lease, various exhibits introduced at trial, and witness testimony to establish its claim that Respondent breached its lease and damaged Appellant. [Trial Tr. pp. 567-96]. (R. pp. 716-745).

Appellant sought to recover $5,950.00 for the patch to the asphalt. [Trial Tr. p.592]. (R. p. 741). Appellant sought to recover $2,625.00 for ductwork. [Trial Tr. p. 594]. (R. p. 743). Appellant sought to recover $6,121.00 for repairs made to the damaged wall by Benchmark Flooring. [Trial Tr. p. 595]. (R. p. 744). Appellant sought $1,757.50 to Integrity Consulting for

engineering work in connection to the damaged wall. [Trial Tr. p. 595]. (R. p. 744). Appellant sought $1,861.13 for supplies in connection with the damaged wall and $723.37 to Sunbelt Rentals for the scissor lift used to repair the wall. [Trial Tr. p. 596]. (R. p. 745). Appellant sought the $250.00 paid to COIT for cleaning of carpets. [Trail Tr. p. 596]. (R. p. 745). While not expressly stated in Appellant's closing arguments, Appellant included $1,600 in their final damage calculations. [App. Br. p. 12]. In total, Appellant requested for a jury award of $20,802.76. [Trial Tr. 596]. (R. p. 745).

Respondent followed suit in rebutting Appellant's claims and asserting its counterclaims for breach of contract and violation of the UTPA. Notably, Respondent discussed the differences in the quotes that it received for the repairs versus the overinflated quotes provided by the Appellant, and discussed how Appellant did not work with Respondent to clear up these issues with the premises prior to filing the underlying lawsuit. [Trial Tr. pp. 602-621]. (R. p. 751-770).

In asking for damages, Respondent first requested $4,424.75 for the breach of contract claim. [Trial Tr. p. 622]. (R. p._). This represented the $1,144.75 that the Respondent had to pay for a forklift after the Appellant effectively shut down Respondent's business due to repaving, the $3,000.00 security deposit, and the $280.00 charge for repairing the bricks on the building. [Trial Tr. p. 622]. (R. p. 771). Respondent requested nominal damages of $1.00 for its UTPA claim for the fraudulent and overinflated invoices. [Trial Tr. pp.623-24]. (R. p. 772-773).

Appellant provided a brief reply to Respondent's closing argument urging the jury to make Appellant "whole." [Trial Tr. p. 627]. (R. p. 776).

Jury Charge

The lower court extensively charged the jury as to the elements in this case. [Trial Tr. pp. 627-641]. (R. p. 776-790). Most notably, for the purposes of the instant appeal, the lower court charged the jury with instructions regarding Respondent's UTPA counterclaim. [Trial Tr. pp. 637-639]. (R. p. 786-788). The lower court first told the jury that the Respondent must have suffered actual damages as a result of the unfair trade practice acts and that said acts must have an impact on the public's interest. [Trial Tr. p. 637]. (R. p. 786). The lower court provided that the proof may be shown by the fact that the practice or act is capable of repetition. [Trial Tr. p. 637]. (R. p. 786). The lower court further explained to the jury that Respondent had the burden to prove by the preponderance of the evidence that there was a claim for UTPA and that there were damages as a result. [Trial Tr. p. 639]. (R. p. 788).

The Jury Verdict

The jury found for both the Appellant and Respondent in their claims. As to Appellant's breach of contract, the jury found in favor of the Appellant and awarded it $10,513.88. [Trial Tr. pp. 645]. (R. p. 794). As to Respondent's breach of contract counterclaim, the jury found in favor of Respondent and awarded it $4,424.75 in damages. [Trial Tr. pp. 645]. (R. p. 794). As to Respondent UTPA's counterclaim, the jury found in favor of Respondent and awarded it $6,089.13. [Trial Tr. pp. 645]. (R. p. 794). The net result is that Appellant did not receive a net award from this trial.

Notably, neither party addressed the jury when asked by the lower court post-verdict. [Trial Tr. pp. 645-46]. (R. p. 794-796).

Post-Trial Motions

Both parties filed post-trial motions. Appellant filed (1) a Motion For Attorney's Fees and Costs as the prevailing party pursuant to Section 28(g) of the Lease; (2) a Motion for JNOV on Respondent's UTPA claim; (3) a Motion for Remittur on Respondent's UTPA claim to reduce the award to $1 or $0; and (4) a Motion For Remittur on Respondent's breach of contract counterclaim of $280.00. (R. pp. 126-141).

Respondent filed a Motion For Treble Damages and Attorneys' Fees to treble the jury's award pursuant to its successful UTPA counterclaim and to recover attorneys' fees as the prevailing party under Section 28(g) of the Lease. (R. pp. 120-125).

The Post-Trial Motions resulted in a hearing held before the Hon. J. Mark Hayes II on September 13, 2022. At hearing, Respondent went first on its motion. In response to the lower court's inquiry as to whether Respondent was the prevailing party, Respondent pointed out that they had presented evidence of the unfair trade practices through the fake invoices and related actions shown at trial. [Post-Order Hearing Tr. pp. 8, 11]. (R. pp. 807, 810). Additionally, Respondent pointed to the mechanic's lien statute for guidance and made mention of the competing offers, to which the Appellant's offer was higher. [Post-Order Hearing Tr. pp. 27-32]. (R. pp. 826-831).

In further response to the lower court questioning the amount of damages requested by Respondent, Respondent stated that arguing for one dollar was a tactical decision because its attorney was acting in a non-legal capacity because the Appellant mandated that all communications go through the Parties respective attorneys and Appellant's counsel was forced into the role of general contractor due to Appellant's filing a lawsuit and limited communications

to counsel for the parties and Respondent's counsel's fees for the performance of non-legal work constituted a significant cost to Respondent. [Post-Order Hearing Tr. pp. 9-10]. (R. pp. 808-809). Additionally, Respondent asserted that the jury likely wanted to negate the award to the Appellant in finding for Respondent in that amount. [Post-Order Hearing Tr. pp. 14-16]. (R. pp. 813-815). Furthermore, Respondent asserted that the damage to Respondent was caused by the Appellant's filing of the suit and Appellant's insistence on all communications going through the attorneys. [Post-Order Hearing Tr. p. 16]. (R. p. 815).

When the lower court asked how to delineate the attorneys' fees for the UTPA claim, Respondent said that all of the claims were so intertwined in this case because the communication attempting to resolve the issues between the parties and the UTPA acts were constant and were focused on making repairs to the Premises and had really nothing to do with legal issues. [Post-Order Hearing Tr. pp. 21-24]. (R. pp. 820-823). Another way to look at it is much of the communication between the attorneys to resolve the controversy by way of making various repairs could have easily occurred between the parties themselves or their designated non-attorney representatives. Respondent was forced to use its attorney because of Appellant's diktat.

In response, Appellant speculated that the jury was confused as to the UTPA instructions. [Post-Order Hearing Tr. p. 26]. (R. p. 825). This was despite the Appellant conceding that the amount of jury instructions on that point were substantial. *Id.* Furthermore, Appellant attributed the award for UTPA damages to "inflammatory statements" made in Respondent's closing argument. [Post-Order Hearing Tr. pp. 39-40]. (R. pp. 838-839). This was despite, as the Court pointed out, the fact that Appellant made a rebuttal to Respondent's closing argument. [Post-Order Hearing Tr. p.39]. (R. p. 838).

Post-Trial Motions Order

The Order on Post-Trial Motions ordered the jury verdict in favor Respondent on its UTPA counterclaim be trebled to $18,267.99, found that Respondent was the prevailing party under the Lease the UTPA and the Lease, and awarded $58,879.55 in attorneys' fees and $3,553.05 in costs to Respondent. (R. p. 11).

Notably, the Court used the references made by the Parties to *Seckinger v. Vessell Excalibur*, 326 S.C. 382, 388, 483 S.E.2d 775, 777-78 (1997), to make this holding. [Order on Post-Trial Motions p. 2]. (R. pp. 9-10). Additionally, the lower court came to the "more logical and reasonable conclusion" that the jury favored the Respondent's case. [Order on Post-Trial Motions pp. 2-3]. (R. p. 9). Further, the lower court took into account that case as a whole and the relative awards handed out by the jury. *Id*.

As to the amount of attorneys' fees awarded to Respondent, the Court considered the traditional South Carolina factors in setting attorneys' fees along with the factors that were "unique in this particular case." [Order on Post-Trial Motions p.4]. (R. p. 11). This included that some of the charges were for prelitigation matters and the fact that the damages were trebled. *Id.* (R. p. 11). It should be noted that the attorneys' fees award was almost half of what Respondent sought in its Motion For Treble Damages and Attorneys' Fees. (R. p. 11).

STANDARD OF REVIEW

An appellate court reviews the denial of a motion for judgment notwithstanding the verdict, or JNOV, by applying the same standard as the trial court and "views the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016). A motion for JNOV is merely a renewal of a

motion for directed verdict. *Jolly v. GE*, 435 S.C. 607, 623, 869 S.E.2d 819, 827, 865 S.E.2d 12 (Ct. App. 2021). Only the grounds raised in the directed verdict motion may be raised in a motion for JNOV, and those not raised in the directed verdict motion are not preserved for appellate review. *State ex rel. Wilson v. Ortho-Mcneil-Janssen Pharm.*, 414 S.C. 33, 67, 777 S.E.2d 176, 194 (2015). A motion for JNOV should be denied if there is more than one reasonable inference that can be drawn from the evidence, or if its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). An appellate court will only reverse a trial court's ruling if no evidence supports its ruling, and if no reasonable jury could have reached the challenged verdict. *See e.g. Gastineau v. Murphy,* 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998)*; Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct. App. 2000).

A trial court's award of attorney's fees is reviewed for abuse of discretion and will not be disturbed absent an abuse of its discretion. *D.A. Davis Constr. Co. v. Palmetto Props., Inc.*, 281 S.C. 415, 419, 315 S.E.2d 370, 372 (1984). This includes both the decision to award attorney's fees, and the determination of the amount to be awarded. *Horton v. Jasper Cty. Sch. Dist.*, 423 S.C. 325, 330, 815 S.E.2d 442, 444 (2018).

ARGUMENT

The trial court correctly denied Appellant's motion for judgment notwithstanding the verdict (JNOV) and its motion for remittitur[3], and Appellant has not preserved the issue of actual damages for review by this Court. Further, the trial court properly awarded attorney's fees under both the Lease Agreement and S.C. Code Ann. § 39-5-140(a). Further, to the extent that the Appellant is seeking a new trial, that issue has not been properly preserved for appeal, and no

[3] Appellant has abandoned its motion for remittitur on appeal. *See* Initial Brief of Appellant, n. 5.

motion for a new trial was filed in the trial court. Therefore, or for any reason in the record pursuant to Rule 220(c) of the South Carolina Rules of Appellate Procedure, the judgment of the trial court should be affirmed, and this appeal dismissed.

I. BECAUSE APPELLANT DID NOT MOVE FOR DIRECTED VERDICT ON THE ISSUE OF ACTUAL DAMAGES, THIS ISSUE IS NOT PRESERVED FOR APPELLATE REVIEW.

As an initial matter, a motion for JNOV may only assert ground made in a motion for directed verdict. "A motion for a JNOV is merely a renewal of the directed verdict motion." *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 171 (2012). In this case, Appellant moved for one directed verdict *solely* on the grounds that there was no evidence that the public interest was impacted. [Trial Tr. pp. 542-45]. (R. pp. 699-702). Appellant conspicuously did not move for a directed verdict on the grounds that there was no proof of damages. *Id.* (R. p. 699-702). The record shows that this argument was made to the jury, but never to the court on a motion for directed verdict. *Id.* at pp. 597-598. (R. pp. 747-48). Therefore, since this issue was not raised in the directed verdict motion but was instead raised for the first time in a JNOV motion, it is not preserved for appellate review. *See e.g. State ex rel. Wilson v. Ortho-Mcneil-Janssen Pharm.*, 414 S.C. 33, 67, 777 S.E.2d 176, 194 (2015) (finding that a failure to raise an issue in a motion for directed verdict "precludes any appellate review").

Even if this issue were properly preserved for this Court's review, the Appellant's argument fails because the jury awarded an amount of actual damages, $6,089.13 which was likely the result of hearing testimony and reviewing e-mail correspondence demonstrating that Respondent incurred substantial costs when Appellant forced Respondent's counsel into the role of a general contractor, and it is altogether irrelevant that Respondent made a tactical decision to

ask for only nominal damages in support of its UTPA claim during its closing argument. . That amount was explicitly awarded as actual damages on the verdict sheet.

Respondent was clearly damaged by having to expend more time and money due to Appellant's conduct. While the costs incurred were the fees of Respondent's attorney, the fees were for the performance of non-legal work because of how the Appellant demanded communications be made. First, Appellant made the incredibly unorthodox decision to file a lawsuit before the Lease term ended or Respondent had any opportunity to make any and all necessary repairs to the Premises that Respondent was contractually obligated to make. To add insult to injury and for no good reason, Appellant even went so far as to refuse to do a final walkthrough of the Premises with Respondent to identify any repairs that were made or needed to be made. Second, the unique facts of the case establish that Appellant forced communication through the attorneys of each party, rather than to each other directly, prior to the end of the lease. [Def. Ex. 14 p. 23]. (R. p. 1,101). This is unusual in a landlord-tenant relationship at the end of the lease. Typically, the parties have conversations as what repair(s) need to be made prior to the tenant vacating the premises and there is absolutely no need for lawyers to be involved in these discussions. Due to Appellant's conduct, Respondent had no choice but to engage counsel to complete non-legal tasks. Respondent's counsel specifically mentioned having to talk to contractors for proposed fixes to the issues with the Premises. [Post-Trial Motions Tr. pp. 9-10] (R. pp. 809-810). This evidence was presented at trial as well through the extensive communications between the attorneys showing the "general contractor" efforts Respondent's counsel undertook in order to resolve the controversy. For this reason, Respondent's counsel described his actions in the same vein as a "general contractor/project manager." *Id*. (R. pp. 809-

810). As a result of Appellant's conduct, Respondent has suffered an ascertainable loss that is recoverable under the UTPA.

II. BECAUSE THERE IS SUFFICIENT EVIDENCE FOR A JURY TO CONCLUDE THAT THERE WAS A PATTERN OF BEHAVIOR BY APPELLANT, THE PUBLIC INTEREST PRONG IS SATISFIED AND THE LOWER COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JNOV.

Appellant's argument is, essentially, that there is no evidence to support the jury's finding that the public interest prong was satisfied. In South Carolina, "The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts." *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004). Notably, a party does not have to show that the company's procedures created a potential for repetition if they show a pattern of prior behavior.

Appellant asks this Court to ignore the first option for showing potential repetition. Appellant's argument fails because there was ample evidence presented at trial for the jury to find that the Appellant had a history of presenting Respondent with fraudulent invoices, especially when the evidence is construed in Respondent's favor. *See RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012). The evidence showed a pattern of behavior by the Appellant. Repeatedly, the Appellant presented invoices which it knew were fraudulent. The issue is not whether or not there is a potential for repetition with future tenants—the issue is whether the Appellant had done these same sorts of actions in the past. The evidence shows that to be the case.

If both a pattern of behavior and a showing based on the company's procedures were required to make out a successful UTPA claim, Appellant would have a better argument. The problem is they are not both required. The case that Appellant relies on most heavily, *Jefferies v. Phillips*, deals with only a single instance of invoice padding. 316 S.C. 523, 525, 451 S.E.2d 21, 22 (Ct. App. 1994). Here, the evidence showed that the Appellant had submitted fake and overinflated invoices numerous times. *See*, Pl. Exs. 6, 9, 10, 12, 17, 18, and 19. (R. pp. 919-921; 924; 925-926; 928-929; 934; 936). It is not necessary to show a propensity for potential future conduct based on procedure when there is a preexisting pattern of behavior. In this case there is a clear pattern of submitting fraudulent invoices for payment. The Appellant can call these invoices quotes if it likes, but that does not change the fact that there was ample evidence for the jury to conclude that they were invoices and they were fraudulent. Therefore, this assignment of error is without merit and this Court should affirm the trial court's denial of Appellant's Motion for JNOV.

III. THE TRIAL COURT CORRECTLY FOUND RESPONDENT TO BE THE PREVAILING PARTY FOR PURPOSES OF AWARDING ATTORNEY'S FEES.

In South Carolina, the "A court determines the prevailing party by evaluating the degree of success obtained." *Heath v. Cty. of Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 711 (1990). This evaluation is in the sound discretion of the trial court and will not be upset absent an abuse of that discretion. *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 617, 635 S.E.2d 922, 924 (Ct. App. 2006) (noting that the definition of a prevailing party "clearly envisions a victory to some degree on the merits," and that definition "embraces a consideration of substance, not form.").

Here, the Lease Agreement at issue allows for an award of attorney's fees to the prevailing party against the non-prevailing party. The Lease Agreement is, however, silent as the definition of prevailing party, requiring the court to make that determination. The jury awarded a verdict of $10,513.88 in actual damages to the Appellant on its breach of contract claim. The jury also awarded a verdict of $4,424.75 in actual damages to Respondent on its breach of contract claim, and $6,089.13 in actual damages in favor of Respondent for Appellant's violation of the Unfair Trade Practice Act, for a total of $10,513.88. As Appellants note repeatedly in their brief, the amount of actual damages awarded to both parties is identical. However, the jury found for the Appellant on only one claim and found for the Respondent on two.

In its order, the trial court specifically held that it was "very clear" that the Appellant was not the prevailing party, and that the *only way* the Appellant could be is to "isolate the jury determination of its award of $10,513.88 of actual damages and to ignore the rest of the litigation involving the Lease." [Order on Post Trial Motions, p. 2.]. (R. p. 9). This is precisely what Appellant asks this Court to do—isolate this entire case at the actual damages award and ignore everything else. That is not the law in South Carolina. The trial court's determination regarding the prevailing party may only be upset on a showing of abuse of discretion, and the Appellant has not made such a showing. Appellant has merely shown that it disagrees with the trial court's reasoned determination, which is not sufficient to constitute abuse of discretion. The trial court also found two independent bases for awarding attorney's fees—the Lease and the Unfair Trade Practices Act. It further observed that "even if the Plaintiff's JNOV and nisi motions were granted, the Plaintiff still would not meet its burden of it being the prevailing party given the magnitude of the case it brought and actively pursued against the Defendant in relation to the award of damages it made to the Plaintiff." *Id.* at p. 3. (R. p. 10)

The trial court did what it was supposed to do—it considered the totality of the circumstances of the case and determined that, despite an even award of actual damages, Respondent was the prevailing party. Appellant has pointed to no law requiring this Court to focus the entire prevailing party inquiry on the amount of damages awarded because there is no such law. Appellant has also not pointed to any evidence of abuse of discretion by the trial court, because there is no such evidence.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING HOW MUCH TO AWARD RESPONDENT IN ATTORNEY'S FEES.

When there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown. *Blumberg v. Nealco*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). "[T]he specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Horton v. Jasper Cty. Sch. Dist.*, 423 S.C. 325, 330, 815 S.E.2d 442, 444 (2018).

Here, the trial court "considered the traditional factors in South Carolina for setting attorney fees" when it made its award of attorney's fees, and made "a diligent effort to determine a reasonable attorney fee to award." [Post-Trial Motions Order at p. 4]. (R. p. 11). It applied the same analysis to award under the UTPA as it did to an award under the Lease Agreement, but only made one award of attorney's fees. *Id*. (R. p. 11) Appellant argues that the court abused its discretion by not breaking out the award of fees for successful claims versus unsuccessful claims. However, Appellant has pointed to no law standing for the proposition that not reducing

a fee award as it argues the trial court should have is an abuse of discretion[4]. While it may be true that "beneficial results obtained" is one factor in determining the amount of attorney's fees, it is but one of six factors, and is not controlling. *See Horton,* 423 S.C. at 330, 815 S.E.2d at 444-45.

The Appellant has not pointed to anything other than a purported failure to "scrutinize the time sheets submitted by counsel and determine which time entries were dedicated to the successful claim and which were dedicated to the unsuccessful claims" as abuse of the trial court's discretion. [App. Br. p. 24]. However, "when an action in which attorney fees are recoverable by statute is joined with alternative theories of recovery based on the same transaction, no allocation of attorney's services need be made except to the extent counsel admits that a portion of the services was totally unrelated to the statutory claim or it is shown that the services related to issues which were clearly beyond the scope of the statutory claim proceeding." *Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992). In fact, the trial court *did* scrutinize the bills that counsel submitted, and it actually *reduced* the amount of attorney's fees it awarded Respondent by nearly forty percent from what it sought. [Post-Trial Motions Order p. 4]. (R. p. 12). It also noted that "some charges appear to be for prelitigation matters," showing that the trial court did in fact scrutinize the bills presented by counsel and determined some were unrelated to the claims brought in the litigation. *Id*. (R. p. 12).

Respondent asked for attorney's fees and costs of a total amount of $99,027.55, and was only awarded $62,432.60—a discount of 37%. In *Maybank v. BB&T Corp.*, the South Carolina

[4] Appellant cites a federal district court case, *Ducharme v. Madewell Concrete, LLC*, No. 6:20-1620-HMH, 2021 U.S. Dist. LEXIS 118904 (D.S.C. June 25, 2021), for the proposition that South Carolina law requires a reduction of attorney's fees based on the amount of time spent on unsuccessful claims. *Ducharme* is a Fair Labor Standards Act case, and the scheme for awarding attorney's fees was governed by federal employment law. It is wholly inapplicable to the issues in this case.

Supreme Court found that a twenty percent reduction in a case involving both UTPA claims and other claims, some of which were not successful, was appropriate. 416 S.C. 541, 580, 787 S.E.2d 498, 518 (2016). The appellant in *Maybank* argued that the billing statements submitted by counsel were not sufficiently detailed, and could not be allocated to the UTPA claim, which was the only claim upon which attorney's fees could be awarded. *Id.*

The Supreme Court rejected this argument. Because the claims "shared the common facts and required combined efforts throughout the litigation process," the trial court's decision to reduce fees by 20% "account[ed] for a distinction in the claims and the time allotted to defend claims unrelated to the UTPA." *Id.* The Court found this to be a reasonable reduction. *Id.* Here, Appellant asks this Court to go a step further, and find an award, reduced by nearly forty percent, to be unreasonable. If anything, the trial court could have awarded *more* than it did and still been within the realm of reasonableness as defined by the South Carolina Supreme Court. Regardless, there is no basis for the contention that the trial court abused its discretion by awarding a reduced amount of attorney's fees, as that reduction accounts for the issues that Appellant now raises on appeal.

The fact that the trial court did not engage in the sort of analysis that Appellant wants, when there is no authority requiring such an analysis, is not abuse of discretion—if anything, the trial court's failure to explain why it reduced the amount it awarded Respondent was abuse of discretion, but that issue is not before this Court. *See Horton v. Jasper Cty. Sch. Dist.,* 423 S.C. 325, 332, 815 S.E.2d 442, 445 (2018) (finding that a trial court abused its discretion by reducing counsel's hourly rate to $100 per hour without basing that decision on any evidence).

V. THIS COURT SHOULD SUMMARILY AFFIRM THE TRIAL COURT PURSUANT TO RULE 220(c) OF THE SOUTH CAROLINA RULES OF APPELLATE PROCEDURE.

As a final matter, this Court has the authority to affirm the trial court for reason in the record pursuant to Rule 220(c) of the South Carolina Rules of Appellate Procedure. *See Chestnut v. AVX Corp.*, 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015). To the extent that the Court finds grounds in the record to affirm the trial court that are not set forth in briefing, this Court should affirm the trial court on those grounds.

CONCLUSION

The trial court did not err when it denied the Appellant's motion for JNOV on the issue of public interest, and appellant has not properly preserved the issue of actual damages for review by this court. The trial court further did no err when it found Respondent to be the prevailing party and awarded it attorney's fees, nor did it err in determining the amount of fees to award. This Court should affirm the trial court in full, for these reasons or for any other reasons found in the record.

This 12th day of October, 2023.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of
Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Mark J. Hayes, Circuit Court Judge

Case No. 2022-001826

Carolina Real Estate Holdings, LLC, Appellant,

v.

Brilin Electric, LLC and W & L Services, LLC, Defendants,

Of Which Brilin Electric, LLC is the Respondent.

CERTIFICATE OF COUNSEL – FINAL BRIEF OF RESPONDENT

The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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