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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2022-001208
Case No. 2018-CP-10-03286

Karolina Richardson and Krista Richardson,

Respondents,

v.

Mt. Pleasant Square Associates, II, LLC d/b/a Oyster Park Apartments, Dewberry Capital Corporation, and GREP Southeast, LLC,

Appellants.

FINAL BRIEF OF RESPONDENTS

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s/Clayton B. McCullough
Clayton B. McCullough, Esq., SC Bar No. 13722
McCULLOUGH KHAN, LLC
2036 eWall Street
Mount Pleasant, SC 29464
(843) 937-0400
(843) 937-0706 (fax)
clay@mklawsc.com

Counsel for Respondents

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court err in denying the Appellants' motions for directed verdict and JNOV on the Respondents' negligence claim brought pursuant to the Residential Landlord Tenant Act because the evidence presented failed to support a finding of a breach of any duty of care under the Residential Landlord Tenant Act?

2. Did the Trial Court abuse its discretion in finding that the Appellants committed a discovery violation and in awarding sanctions in the amount of $25,200.00?

STANDARD OF REVIEW

In an action at law, on appeal of a case tried by a jury, appellate courts may only correct errors of law. Factual findings of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d773, 774 (1976).

In ruling on a motion for directed verdict, a court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 514 S.E.2d 126, 130 (1999). When the evidence yields only one inference, a directed verdict in favor of the moving party is proper. *Id*. The Trial Court can only be reversed on appeal when there is no evidence to support the ruling below. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 430, 445 S.E.2d 439, 440 (1994). A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict and the jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000). Neither a directed verdict nor judgment notwithstanding the verdict should be granted unless only one reasonable inference can be drawn from the evidence. *Sauers v. Poulin Bros. Homes, Inc.*, 328 S.C. 601, 605, 493 S.E.2d 503, 505 (Ct. App. 1997). If more than one reasonable inference can be

drawn from the evidence, the case must be submitted to the jury. *Futch v. McAllister Towing of Georgetown*, 335 S.C. 598, 611, 518 S.E.2d 591, 597 (1999).

"[I]n ruling on a motion to set aside a verdict, the trial court is concerned with the existence of evidence, not its weight." *State v. Gunter*, 273 S.C. 347, 350, 256 S.E. 2d 317, 319 (1979).

In ruling on whether a sanction is appropriate, the Court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice. *Laney v. Hefley*, 262 S.C. 54, 60, 202 S.E.2d 12, 15 (1974). "An award of attorney's fees and costs is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion." *Parker v. Morin (Ex parte McMillan)*, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995). "The six factors to consider in determining an award of attorney fees are: 1) the nature, extent and difficulty of the legal services rendered; 2) the time and labor devoted to the case; 3) the professional standing of counsel; 4) the contingency of compensation; 5) the fee customarily charged in the locality for similar services; and 6) the beneficial results obtained." *LeFurgy v. Long Cove Club Owners Assoc.*, 313 S.C. 555, 561, 443 S.E.2d 577, 580, n.4 (Ct. App. 1994).

STATEMENT OF THE CASE

I. Lawsuit

This is a negligence action brought pursuant to the South Carolina Residential Landlord Tenant Act (RLTA). The Complaint was filed in Charleston County Court of Common Pleas on June 27, 2018, by Karolina ("Karola") Richardson and her daughter Krista Richardson. The suit was filed against Mt. Pleasant Square Associates, II, LLC d/b/a Oyster Park Apartments; Dewberry Capital Corporation; Greystar Management Services, L.P.; and Greystar Real Estate Partners, LLC. Initially, there were causes of action for negligence, violation of the South Carolina Unfair

Trade Practices Act, negligent misrepresentation, fraudulent misrepresentation, and civil conspiracy. (R. pp. 27-40). The parties stipulated to the substitution of GREP Southeast, LLC to replace Greystar Management Services, L.P. and Greystar Real Estate Partners, LLC.

The case was fully discovered and proceeded to trial before the Honorable Jennifer McCoy on July 18, 2022. At the close of Respondents' case in chief, Appellants moved for directed verdict on all causes of action. Judge McCoy granted a directed verdict on the Unfair Trade Practices claim and the civil conspiracy claim. The court denied the motion for directed verdict on the negligence claim and took under advisement the motion as to negligent misrepresentation and fraudulent misrepresentation. Respondents subsequently withdrew the claims for negligent misrepresentation and fraudulent misrepresentation and proceeded on a single claim for negligence.

After five (5) days of trial, the jury returned a verdict of $850,000.00 actual damages in favor of Karola Richardson and $150,000.00 in favor of Krista Richardson. (R. pp. 18-26, 526-527). The jury allocated fault among the Defendants as follows: Mt. Pleasant Square Associates II, LLC d/b/a Oyster Park – 35%; GREP Southeast, LLC – 35%; and Dewberry Capital Corporation – 30%. (R. pp. 18-26, 533-534). Appellants filed a Motion for Judgment Notwithstanding the Verdict (JNOV), which was denied by Order dated August 24, 2022. (R. pp. 7-8).

II. Sanctions

The discovery process in this case was complicated and time consuming. One focus of the discovery in this litigation was Respondents' efforts to determine the location, timing, extent, and nature of water infiltration issues at Oyster Park causing mold to appear in apartments. This

information was sought in written discovery, document production requests, depositions, and ESI discovery.

After approximately three (3) years of discovery (and two (2) motions to compel), approximately 40 instances of mold and mildew complaints were disclosed, and Respondents prepared for trial based on this information. On the Friday before trial, Appellants, for the first time, produced approximately 1,000 additional pages containing, among other things, an additional 60 mold complaints from Oyster Park residents. Based on this late production, especially after the tortured nature of the discovery process in this case, Respondents moved for sanctions on July 15, 2022. (R. pp. 114-118). Respondents also submitted the Affidavit of Clayton B. McCullough, Esq. detailing the cost and time incurred in the unnecessary ESI discovery search. (R. pp. 1240-1244). A hearing on this issue was conducted on July 18, 2022, the morning trial began.

On December 8, 2022, the Trial Court entered an Order granting Respondents' motion for sanctions and awarded a total sanction in the amount of $25,200.00 ($2,250.00 for reimbursement for computer forensic services relating to the ESI search, $11,250.00 for 25 hours of time for Clayton B. McCullough, Esq. to review ESI document production, and $11,700.00 for paralegal Alicia Terwilliger to review ESI document production). (R. pp. 9-13). Appellants then filed a Motion to Alter or Amend Order and/or Motion to Reconsider on December 19, 2022. A hearing was conducted by the Trial Court on January 19, 2023. The Court issued an Order Denying Defendants' Motion to Alter or Amend Order and/or Motion to Reconsider on June 6, 2023. (R. pp. 14-17).

STATEMENT OF THE FACTS

Oyster Park Apartments (hereinafter referred to as "Oyster Park") is an apartment complex located at 1421 Shucker Circle, Mount Pleasant, South Carolina. Oyster Park was constructed by

Landsouth Construction, LLC. (R. p. 370). Dewberry Capital Corporation developed Oyster Park and oversaw the construction process. (R. p. 360). Dewberry Capital Corporation sold Oyster Park to Mt. Pleasant Square Associates, II, LLC., the owner of Oyster Park at all relevant times. (R. p. 360). A Greystar entity called GREP Southeast, LLC served as the property manager of Oyster Park. (R. p. 362).

Since it first opened, Oyster Park has had continuous and ongoing issues with:

1. Roof leaks (R. pp. 375, 442, 795-1019, 1024-1062)
2. Floods (R. pp. 317-318, 375, 442, 795-1019)
3. Excess humidity caused by HVAC issues (R. pp. 375, 443, 773-780, 795-1019, 1063-1085)
4. Plumbing leaks (R. pp. 375, 442, 795-1019, 1035-1062)
5. Window leaks (R. pp. 375, 442, 795-1019, 1035-1062)
6. Mold (R. pp. 629-749, 773-1062, 1066, 1085)

As of the date of trial, there had been approximately 100 reported and documented cases of water leaks, mold, and mildew claims reported by tenants. (R. pp. 395-396; 795-1019). Kathlina Sampson, the on-site Greystar Property Manager, testified as to the following regarding Oyster Park:

> Q. So we've got water coming in from the ground; we've got water coming in from the side; we've got water coming in from the top; and we have water growing from within – moisture from within?
>
> A. More or less, yes.

(R. pp. 375-376).

On May 17, 2017, Karola Richardson entered into an Apartment Lease Contract with an entity listed as "Oyster Park" for the rental of Unit 104. That same day, Karola and her daughter Krista moved into Unit 104. (R. p. 317). While living in Unit 104, Karola and Krista Richardson

noticed odd musty smells in Unit 104. (R. p. 318). These odd musty smells were reported to Oyster Park staff. (R. p. 318).

On May 23, 2017, Unit 104 flooded with water pouring into the unit from the front door and from under the walls. (R. p. 317). In fact, Units 102, 103, 104, 105, and 106 (a total of five (5) units) all flooded at that same time. (R. pp. 318, 795-1019). The Oyster Park onsite Service Manager, Travis Harmon, was tasked "to complete the Mold/Water Response Report" in response to the flood; however, no Report was ever performed. (R. pp. 436-437, 795-1019).

As a result of the flooding, on May 26, 2017, the Richardsons signed another lease and were moved to Unit 101 – the unit next to the five (5) flooded units. (R. pp. 795-1019). At the time of the move into Unit 101, Karola Richardson performed a move-in inspection with an Oyster Park employee. (R. p. 320). During this inspection, Karola Richardson informed the Oyster Park employee that "the breezeway looked like as if it may flood as well" and that "101 looks like it may eventually suffer water penetration and mold." (R. pp. 320-321, 1088-1092). This information was directly provided to the Oyster Park employee by Karola Richardson and written down on Oyster Park's Move-In Inspection Form for Unit 101 on May 27, 2017 – approximately two (2) weeks before the active mold growth was discovered in Unit 101. (R. pp. 321, 1088-1092).

After the Richardsons moved into Unit 101, they continued to smell musty odors, and they continued to notify Oyster Park staff of the same. (R. pp. 322-323). During this same time period, the Richardsons began to suffer extensive physical issues including bronchitis, nasal congestion, allergy symptoms, upper respiratory issues, swollen eyes, sinusitis, and related health issues. (R. pp. 323-324, 1086-1087).

On June 23, 2017, a different tenant submitted a request for help to Oyster Park because the "ceiling is dropping water now. Water spots have not gone away **from last report**. Now there

is water dripping from the spots and it's not raining." (R. pp. 795-1019) (emphasis added). It should be noted that the "last report" referenced in this tenant's complaint was never produced in discovery. The tenant's claim was apparently ignored because on June 25, 2017, the same tenant submits another request for help stating "the ceiling is leaking and it's not raining yet. They are calling for rain all day. PLEASE fix this. We have pots under the leaks (yes there is more than 1) to catch the water. The ceiling is peeling and the water spots have grown." (R. pp. 795-1019). Again, no Mold/Water Response Report was completed. Ultimately, the tenant filed a complaint with the Town of Mount Pleasant for negligence against Oyster Park. (R. pp. 795-1019).

On July 10, 2017, the Richardsons discovered extensive mold growth within Unit 101 and notified Oyster Park. (R. pp. 324-325, 795-1019). Karola Richardson emailed Oyster Park staff in the early morning hours of July 10th to notify them of the mold. (R. pp. 1095-1096). In response, Kathlina Sampson, (Greystar's on-site Property Manager) began an email chain with Douglas German (Dewberry Capital – Construction & Development) and Christy Stevens (Greystar – Senior Regional Manager) to discuss and manage the situation. (R. pp. 767-772). The emails, all dated July 10, 2017, state:

Sampson writes: "Hi Douglas – Please let me know if construction would like to be the responsible party for all the remediation as needed for the unit. This is a pretty intense case. Travis informed me that there was some communication regarding a plumbing issue that was going to be handled by construction in a unit that is directly above this unit in 301 that has not been resolved as of this morning. It seems that the water leak is settling at 101. Also a bit of history for this particular unit, she is the occupant that experienced the flooding that occurred and had to be relocated."

German responds: "This is the first I've heard of any leak in Building G…? Yes, LandSouth should definitely be responsible for this."

Stevens responds: "This is the same resident that had the foundation issue in her initial apartment. Kat – can you confirm that unit number? This sounds

> fishy to me.. she has already moved once. We should certainly loop in legal counsel on this one."

(R. pp. 767-772).

This email string is clear evidence that Appellants were aware of the leak in Unit 301 and had asked LandSouth (referred to as "construction" by Sampson but then directly as "LandSouth" by German in his response) to remedy the situation. It is also clear the leak was known PRIOR to Karola Richardson reporting mold in her unit. In July 2017, Travis Harmon was the Maintenance Supervisor at Oyster Park. (R. p. 362). He responded to on-site construction issues and was in charge of reporting the issues and having them repaired. It is clear from Sampson's email that:

1. Travis was aware of this leak in Unit 301 before mold was discovered in Unit 101 ("there was some communication regarding a plumbing issue . . . in a unit that is directly above this unit in 301 **that has not been resolved as of this morning**.")
2. Oyster Park was trying to get LandSouth ("construction") to fix the plumbing leak ("plumbing issue that was going to be handled by construction.")

There is no other plausible explanation for this email, other than that Travis Harmon knew about the leak, had not fixed it, and was trying to get LandSouth to fix it – all prior to Karola Richardson notifying Oyster Park of mold in Unit 101. While all of this was happening, no one stopped the leak or checked Unit 201 to see if it was saturated (it was) and had mold or that the water had spread downhill into Unit 101, causing more saturation and mold (it had).

The leak that caused the mold in Unit 101 was caused by a plumbing leak in Unit 301 that caused water to flow down into Unit 201 and then ultimately into Unit 101. (R. pp. 366-367). Specifically, because the buildings settled without sufficient spacing in the plumbing itself, the plumbing pipes cracked and caused leaks in Units 301, 201, and 101. (R. p. 444). Unit 301 was occupied, and it was its tenants' use of the washing machine that created the water leak. (R. p.

466). This identical building defect occurred again in a different building, but with the same results, in January 2018, causing more flooding into units. (R. pp. 795-1019).

In response, Oyster Park hired a Certified Mold Inspector to perform an air quality test. The air collection was performed on Unit 101 and the surrounding area. (R. p. 629). The mold analysis found significantly elevated levels of mold, specifically Penicillium / Aspergillus in Unit 101. (R. pp. 630-633).

On July 11, 2017, Belfour – a local property remediation company – was hired by Oyster Park to remediate Units 101, 201, and 301. (R. p. 636). Again, these three (3) units are in a stack, with Unit 101 (the Richardsons' unit) being on the ground floor, Unit 201 being directly above that on the second floor, and Unit 301 directly above that on the third floor.

On July 14, 2017, four (4) days after Karola Richardson notified Oyster Park of active mold growth in Unit 101, Belfour first began the process of investigating the extent of water intrusion and mold in these three (3) impacted units. (R. pp. 637-641, 673-743). In addition to the water and mold in Unit 101, Belfour's documents show it discovered excessive moisture (saturated drywalls) in the bathroom and laundry areas of Units 201 and 301, to include "walls, ceilings, and floor," and that there was also active mold in Unit 201. (R. pp. 637-641). Belfour's report and photographs show multiple areas in these units with extensive water damage and active mold growth. (R. pp. 673-743). The actual remediation process did not begin until July 17, 2017 – seven (7) days after first being notified by Karola Richardson of the mold in Unit 101. Although Belfour was initially hired by Oyster Park to repair Units 101, 201, and 301, Oyster Park ultimately only hired them to remediate Unit 101. (R. pp. 642-666, 669-743). Oyster Park has no record of who repaired units 201 and 301 or when the repairs were made. (R. p. 372).

During the remediation of Unit 101, Belfour found mold in the walls and ceiling in the laundry room and bathroom, as well as in the internal wall cavity itself and the framing members of the walls. (R. pp. 308, 590, lines 8-18). Belfour also discovered cracked plumbing pipes in Unit 101 causing additional leaks. (R. pp. 308, 589, lines 5-12).

In response to the mold found in Unit 101 and the prior flooding in Unit 104, Karola Richardson begged Kathlina Sampson, a Greystar employee and the on-site manager for Oyster Park, to allow her and her daughter to move into another Greystar property. (R. p. 325). Sampson refused and, instead, moved the Richardsons into a third Oyster Park apartment – Unit 102 – which was one of the five (5) units that had flooded in May. (R. p. 326).

The Richardsons' health continued to deteriorate after moving to Unit 102, their third Oyster Park apartment. (R. p. 329). Finally, as a result of their ongoing significant health issues caused by the continuous mold exposure, the Richardsons moved out of Oyster Park on September 2, 2017 and September 3, 2017.

During this same time period described above (June – August 2017), Appellant Dewberry Capital Corporation, the developer of Oyster Park, was working with the builder, LandSouth Construction, to have them come back to perform warranty repairs. (R. p. 367). There were ongoing disputes between LandSouth and Oyster Park about water leaks and LandSouth's refusal to come and complete repairs. Douglas German testified at trial. In the summer of 2017, he was the Development Associate for Dewberry Capital. (R. pp. 439-440). He was in charge of overseeing the finalization of the construction of Oyster Park. (R. p. 440). On July 21, 2017, there were a series of emails between Douglas German and representatives of LandSouth Construction and Oyster Park relating to active roof leaks and LandSouth's refusal to come back to make repairs. Mr. German wrote:

At 9:22 a.m. – "All- This is incredibly urgent, third time this leak has affected our residents. Please advise when roofer will be here to handle this leak yet again. Their ceiling is soaked and on the verge of falling."

At 9:29 a.m. (in response to an email from LandSouth) – "Have you not received your check as agreed upon for CO of B, Deck, & C/D? This shouldn't be a matter of payment considering this has been an issue since before these folks moved in, dating back to February! My residents are having water pouring into their unit for the THIRD time now. That's absolutely unacceptable."

At 12:39 p.m. (in response to an email from LandSouth) – "This isn't 'more work' this is correcting poor work which has been an issue for months and now it's an issue for our resident who is being subject to this roof leak (for the 2nd time) which will ultimately turn into mold issue. Do you want to be held responsible for that?? Have a little compassion for correcting work done improperly by your subs which is now adversely affecting my residents whom are paying high dollar to live in this unit.

(R. pp. 1024-1026).

Mr. German testified he was worried about these water leaks causing mold. (R. p. 451). It is also clear that LandSouth's refusal to come back on site to make these repairs was because it had not been paid by the developer what it was owed. (R. pp. 1024-1026). These issues had been occurring since February 2017, and Mr. German was worried about mold growth impacting unit renters. (R. pp. 448-451). During this same time period, Mr. German submitted a comprehensive punch list to LandSouth, which included many more notes about water leaks and mold. (R. pp. 1027-1034).

Appellants have taken the position that Respondents' injuries were caused by LandSouth. This lawsuit was filed on June 27, 2018. On June 20, 2019, Appellants moved to amend their answer and assert third-party claims against LandSouth Construction, LLC. (R. pp. 71-107). The motion includes a Proposed Amended Complaint and Third-Party Complaint which states, in part:

> On information and belief, the underlying cause of the mold is a construction defect arising from the installation of certain plumbing by contractors working on the Project.

(R. p. 87, para. 102).

In early July 2017 when the leaks in Unit 301 occurred, Douglas German, the person in charge of handling these construction issues and interfacing with LandSouth, was out of the country in Italy on a family trip. (R. p. 446). As such, this responsibility would have fallen to Travis Harmon in German's absence. A clear reading of the emails cited above shows Travis Harmon was trying to get LandSouth to come and repair these construction defects, and LandSouth was not agreeing to do so because Dewberry Capital Corporation was not paying the bills submitted by LandSouth. (R. pp. 767-772, 1024-1026). All the while, Unit 301 leaked into Unit 201 and then into Unit 101, causing mold and Respondents' injuries.

During this same time period, it is clear there was insufficient documentation of the issues occurring at Oyster Park – including in Respondents' three (3) units. Despite a clear Greystar policy to document water and mold events (*see* R. pp. 750-766), Sampson, the on-site Property Manager, admitted the appropriate reporting was not done after Unit 104 (Respondents' first apartment) flooded, after Units 102 (Respondents' third apartment), 103, 105, and 106 flooded, after mold and saturated drywall was found in Unit 101 (Respondents' second apartment), after mold and saturated drywall was found in Unit 201, and after saturated drywall and a leaking plumbing pipe were found in Unit 301. (R. pp. 436-437). In fact, there is not even a record of the saturated drywall and leaking plumbing pipe in Unit 301 or report for that unit. (R. pp. 436-437).

ARGUMENT

I. The Trial Court Correctly Denied Appellants' Motions for Directed Verdict and JNOV on Respondents' Negligence Claim Brought Pursuant to the Residential Landlord Tenant Act (RLTA).

In ruling on a motion for a directed verdict, a court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Swinton Creek Nursery*, 334 S.C. at 476, 514 S.E.2d at 130. The Trial Court can only be reversed on appeal when there is

no evidence to support the ruling below. *Strange*, 314 S.C. at 430, 445 S.E.2d at 440. A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict and the jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision. *Welch*, 342 S.C. at 300, 536 S.E.2d at 419.

The jury returned a verdict on the single cause of action for negligence.

"Negligence actions, such as this one, may be brought under the RLTA (the RLTA creates a right in tort for breach of a duty owed by the landlord to the tenant). As with any negligence action, plaintiff must establish (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach." *Nedrow v. Pruitt*, 336 S.C. 668, 675, 521 S.E.2d 755, 758 (Ct. of App. 1999) (internal citations omitted).

"In adopting the RLTA, the General Assembly expressly provided that the landlord has a duty to make all repairs and to do whatever is reasonably necessary to keep the premises in a fit and habitable condition." *Id*. at 675, 676 (citation omitted).

The South Carolina Residential Landlord Tenant Act states:

> (a) A landlord shall:
> . . .
>
> (2) make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;
>
> (3) keep all common areas of the premises in a reasonably safe condition. . .;
>
> . . .
>
> (5) maintain in reasonably good and safe working order and condition all . . . plumbing, . . ., heating, ventilation, air conditioning. . .

S.C. Code Ann. § 27-40-440.

Section 27-40-610(b) provides that "the tenant may recover actual damages . . . for any noncompliance by the landlord with Section 27-40-440."

There was significant evidence provided at trial to justify the Trial Court's denial of the motion for directed verdict and post-trial motion for JNOV. Appellants incorrectly state that the RLTA requires written notice to the landlord for a claim to exist citing S.C. Code Ann. § 27-40-630(d). That code section deals with the wrongful failure to provide essential services. Respondents' case is based upon S.C. Code Ann. § 27-40-440 (2), (3), and (5). These code sections do not require **written** notice to the landlord. The case cited by Appellants in support of their notice requirement actually states the following: "[A]s a result, this court has held the Landlord-Tenant Act creates a cause of action for a tenant of residential property against the landlord, 'for failure, after notice, to make necessary repairs and to do what is reasonably necessary to keep the premises in a habitable condition.'" *Robinson v. Code*, 384 S.C. 582, 586, 682 S.E.2d 495, 497 (Ct. App. 2009) (citing *Watson v. Sellers*, 299 S.C. 426, 433, 385 S.E.2d 369, 373 (Ct. App. 1989). As such, for a claim to exist, the landlord must be on notice of the issue and fail to remedy it. There is no requirement for written notice. If the General Assembly wanted to require written notice for S.C. Code Ann. § 27-40-440 (2), (3), and (5), it would have done so. The General Assembly required written notice for S.C. Code Ann. § 27-40-630(d) and chose not do so in S.C. Code Ann. § 27-40-440 (2), (3), and (5). This omission is significant to show the existence of a different intention. *State v. Ramsey*, 409 S.C. 206, 211, 762 S.E.2d 15, 18 (2014).

Here, there is ample evidence of notice to Appellants of mold and water leaks before Karola Richardson notified them of active mold growth in Unit 101 – Respondents' second apartment. First, Karola testified she smelled musty odors while living in Unit 104 and notified the staff of Oyster Park on multiple occasions. (R. p. 318). Nothing was done to investigate the cause of these

odors. Second, five units experienced significant flooding causing Respondents to move apartments. Nothing was done to investigate (or document) the extent of the flooding and if the water infiltration caused mold to grow in these areas. Third, before moving into Unit 101, Karola told an Oyster Park employee that Unit 101 looked like it would flood (like the 5 adjoining apartments), which would result in mold. (R. pp. 320-321). This information was documented by an Oyster Park employee on the Move-In Inspection Form for Unit 101. (R. pp. 1088-1092). Again, nothing was done. Fourth, after moving into Unit 101, Karola continued to smell the musty odor and continued to notify the staff at Oyster Park. (R. pp. 322-323). Nothing was done to investigate the source of the smells and figure out what was causing them to occur. Finally, and most tellingly, after Karola reported the mold growth in Unit 101, the Greystar / Dewberry / Oyster Park representatives' email chain shows that Travis Harmon had already known about, and discovered, the leak in Unit 301 and was trying to get LandSouth to repair it. (R. pp. 767-772). It is undisputed that the leak in Unit 301 was the cause of the water and mold issues in Unit 201 and Unit 101 and the direct and proximate cause of the Respondents' injuries. Any one of these facts alone justify the Trial Court denying Appellants' motions for directed verdict and for JNOV and allowing this case to go to the jury.

Additionally, Travis Harmon, the employee in charge of responding to the ongoing active water leak in Unit 301, was not called by Appellants to testify at trial. A party's failure to call its own employees as witnesses to testify to facts which are reasonably known to them gives rise to an inference that the employees' testimony, if presented, would have been unfavorable to the party. *Brock v. Carolina Scenic Stages*, 219 S.C. 360, 365, 65 S.E.2d 468, 470 (1951).

Finally, as of the date of trial, there were approximately 100 documented complaints of mold, mildew, and water leaks by tenants at Oyster Park. (R. pp. 396, 795-1019). Despite a clear

Greystar policy to document water and mold events, Kathlina Sampson admitted the appropriate reporting was not done after Unit 104 (Respondents' first apartment) flooded, after Units 102 (Respondents' third apartment), 103, 105, and 106 flooded, after mold and saturated drywalls were found in Unit 101 (Respondents' second apartment), after mold and saturated drywalls were found in Unit 201, and after saturated drywalls and a leaking plumbing pipe were found in Unit 301. (R. pp. 436-437). In fact, there is not even a Greystar record of the saturated drywalls and a leaking plumbing pipe in Unit 301. (R. pp. 436-437). Appellants admit they did not follow their own reporting guidelines, and many of the instances of water intrusion and mold at Oyster Park during the May through August 2017 time period were not documented in any way. (R. pp. 436-437). There are no records to show what was found or how the issues were remedied. This is further justification for denying the Appellants' motion for directed verdict and JNOV. The evidence shows Oyster Park has had systemic problems with leaks causing mold beginning at least by February 2017. (R. pp. 1024-1026). The scope and scale of the ongoing issues at Oyster Park put Appellants on notice of issues in the entire complex – not just in Units 101, 102, and 104.

Based on the clear evidence in the record, the Court appropriately denied Appellants' motion for a directed verdict and motion for JNOV. Respondents provided sufficient evidence that Appellants failed, after having notice, to make necessary repairs and to do what was reasonably necessary to keep the premises in a habitable condition. There was also sufficient evidence that Appellants failed to maintain the plumbing in reasonably good and safe working order and condition. There was sufficient evidence at trial establishing Appellants violated RLTA §§ 27-40-440(a)(2), (3), and (5).

Appellants try to argue that written notice is required; however, that is not the legal standard. They also argue that by moving Respondents from Unit 101 into Unit 102 several days

after Karola Richardson notified them of visible mold growth in her apartment, that they have satisfied the RLTA. They ignore the fact that all these units had previously seriously flooded in the weeks before and that they smelled musty and likely contained mold. They ignore the fact that an active (**known**) plumbing leak went unrepaired in Unit 301 and was left long enough to allow the water to flow downhill and saturate Unit 201, causing mold in that unit and then to continue to leak down into Unit 101, saturating it and causing mold to grow in the wall cavity and then long enough for mold to grow on the walls visible in the apartment. After several more days, Appellants then moved Respondents back into previously flooded Unit 102. This entire time, Respondents were getting sicker and complaining about smelling musty odors in all of these same areas. At no time did Appellants ever disclose to Respondents information about the ongoing plumbing issue causing the leaks and mold.

Finally, Appellants misapply S.C. Code Ann. § 27-40-610, which provides a process for a tenant to provide written notice to a landlord spelling out breaches to the lease agreement and allowing a 14-day cure period. Respondents did not pursue a breach of lease claim. This code section and the 14-day time period has no bearing on Respondents' negligence claim. Similarly, Appellants' reliance on S.C. Code Ann. § 27-40-630 is misplaced. Respondents did not make a claim for failure to provide essential services. For the reasons stated above, Appellants' appeal should be denied.

II. The Trial Court Appropriately Awarded Sanctions for Discovery Abuse and Did Not Abuse Its Discretion.

Respondents have appealed the Trial Court's Order awarding sanctions arising out of Appellants' failure to produce approximately 1,000 additional pages containing approximately 100 resident complaints of mold and water infiltration into apartments at Oyster Park until the business day before trial. If a party fails to obey an order to provide or permit discovery, the Trial Court

may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment. Rule 37(b)(2)(C), SCRCP.

In determining the appropriateness of a sanction, the Court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice. *Laney*, 262 S.C. at 60, 202 S.E.2d at 15. "An award of attorney's fees and costs is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion." *Parker*, 319 S.C. at 335, 461 S.E.2d at 45.

"The six factors to consider in determining an award of attorney fees are: 1) the nature, extent and difficulty of the legal services rendered; 2) the time and labor devoted to the case; 3) the professional standing of counsel; 4) the contingency of compensation; 5) the fee customarily charged in the locality for similar services; and 6) the beneficial results obtained." *LeFurgy*, 313 S.C. at 561, 443 S.E.2d at 580, n.4.

As stated, Appellants produced discoverable documents the day before trial. Emily Sheets, trial counsel for Appellants, explained to the Trial Court that she discovered the Oyster Park staff kept notebooks of resident claims on-site – including claims for water leaks and mold. (R. pp. 294-296). Sheets immediately requested those records, confirmed they were relevant and discoverable, and notified Respondents' counsel immediately. (R. pp. 294-296). The documents were then produced on Friday, July 15, 2022. The trial began on Monday, July 18, 2022. On Sunday, July 17, 2022, Plaintiffs' counsel emailed the Trial Court twelve (12) exhibits in support of their motion for sanctions.

The email stated as follows:

> Please allow this email to serve as a supplement in support of our Motion for Sanctions filed on Friday. The issue is the failure, until Friday, to produce records of approximately 50 mold complaints made by tenants at Oyster Park. I have attached some of the more specific letters and emails on this issue, however, based

on the trial preparation this is by no means complete. I would also stress that I have had countless conversations with the lawyers for the Defendants over the past 3.5 years trying to obtain this information.

The following materials are attached hereto:

Exhibit 1 Letter dated Jan. 25, 2019 to Jamie Ackerman asking for Defendants to supplement discovery to include mold complaints – this information was not provided in their discovery responses.

Exhibit 2 Letter dated Feb. 19, 2019 to Jamie Ackerman again asking for mold complaints (Defendants only produced information about Plaintiffs complaints).

Exhibit 3 Motion to Compel

Exhibit 4 Letter dated Dec. 19, 2019 to Douglas Leadbitter asking for supplemental responses to provide mold complaints.

Exhibit 5 Letter dated July 7, 2020 asking for an update on discovery including Oyster Park resident mold complaints.

Exhibit 6 Email from Gower Wooten and Darnelle – they are "waiting on some additional information from Defendant to respond"

Exhibit 7 Motion to Compel

Exhibit 8 Letter to Doug Leadbitter dated Sept. 24, 2020 asking to supplement responses to mold complaint and confirming will take up with Court at hearing

Exhibit 9 Order dated Jan. 10, 2021 from Judge McCoy granting Plaintiffs' Motion to Compel (ESI searches and supplement of mold claims)

Exhibit 10 Email from Kirkley White dated Dec. 10, 2021 stating the ESI search would cost "anywhere from $15,000 to $50,000" and stating that it was unnecessary because Defendants produced all mold complaints that Defendants have in either hard copy or electronically

Exhibit 11 Email from Emily Sheets (in response to finding an email about a "mold book" kept by Oyster Park staff) dated June 24, 2022 stating Defendants have produced everything we have but she would verify

Exhibit 12 Supplemental document production dated Friday, July 15, 2022 producing approximately 1000 additional documents containing, among other things, an additional 40-50 resident mold complaints.

(R. pp. 1116-1239).

The discovery requests and motions to compel make clear the fact that Respondents were seeking information about mold, mildew, and water complaints by Oyster Park residents. The materials also show the Trial Court ordered this information be produced. The correspondence shows Respondents' counsel's efforts to discover this information. After Respondents' efforts failed, the court ordered an ESI search for this information. An email from Kirkley White, dated December 10, 2021, in response to the ongoing ESI search, states the "cost will range anywhere from $15,000 to $50,000 depending on the volume of e-mails that are returned" and further states:

> "Also, keep in mind that we have already produced on two separate occasions the file for all mold related complaints kept in hard copy or electronically at Oyster Park, and separate search hits of all emails related to mold claims/complaints from tenants at Oyster Park and have updated these as our client's received them. So, we expect the results of these searches to duplicate what your client has already received in discovery."

(R. pp. 1233-1235).

On June 24, 2022, Respondents' counsel emailed Appellants' trial counsel asking about a "mold book" referenced in an email to Kathlina Sampson that was produced as part of the ESI search. In response, Appellants' counsel wrote, "We'll look into it and get back to you. As far as I know, we've produced everything we have but I'll verify and this email will suffice for a supplemental request." (R. pp. 1236-1237).

Ultimately, on the Thursday before trial, Appellants' trial counsel learned that Oyster Park had multiple notebooks of resident complaints in the Oyster Park office broken down by unit number and details of the complaint. (R. pp. 294-295). This information was then produced to Respondents' counsel. From it, many additional complaints of water leaks and mold were discovered and referred to at trial. (R. pp. 795-1019). The bottom line is that this information was not produced in a timely manner. It was not produced after two (2) motions to compel were filed and granted. Significant time, money, and attorney, staff, and court energy was wasted – all of

this could have been avoided had Appellants simply turned over the mold books that were sitting in the Oyster Park Property Manager's office in a timely manner. The Trial Court appropriately considered "the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice" when making its decision. *Laney v. Hefley*, 262 S.C. 54, 60, 202 S.E.2d 12, 15 (1974). Furthermore, "an award of attorney's fees and costs is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion." *Parker v. Morin (Ex parte McMillan)*, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995).

In making the award, the Trial Court considered the six (6) relevant factors in its order granting sanctions and order denying the motion for reconsideration. The Court relied upon the exhibits referenced above, as well as the Affidavit of Clayton B. McCullough, Esq in concluding "the attorney's fees and costs requested by Plaintiffs are reasonable based on the (a) nature, extent, and difficulty of the case, (b) the time and labor necessarily devoted to the case, (c) professional standing of counsel, (d) contingency of compensation, (e) beneficial results obtained, and (f) customary legal fees for similar services" (R. pp. 9-13).

In ruling on Appellants' motion to reconsider, the Trial Court explained its reasoning in awarding attorneys' fees and costs, stating: "At the time of trial, it was presented to this court, and agreed upon by Defense counsel, that documents sought during the course of discovery and ultimately ordered via cumbersome technology searches, were actually available in notebooks which sat in the office of the apartment complex at issue . . . While the court appreciates the position Defense counsel found herself in immediately prior to trial, as well as her candor to the court, it was apparent to the court that a long and tenuous discovery exploration was launched that should not have been." (R. pp. 14-17). The Court awarded Respondents sanctions based on this unnecessary discovery exploration. The Trial Court did not abuse its discretion in doing so.

Finally, Appellants' objection to the payment of paralegal fees was dealt with appropriately by the Trial Court, which determined that this time was not a redundant fee and is appropriate under these circumstances. The law allows for the payment of paralegal fees. (R. pp. 14-17).

CONCLUSION

As shown above, there was sufficient evidence related to notice provided to Appellants and the case was properly submitted to the jury. Furthermore, the Trial Court did not abuse its discretion in awarding monetary sanctions. Respondents respectfully request the Trial Court be affirmed and the jury's verdict affirmed.

Respectfully submitted,

s/Clayton B. McCullough
Clayton B. McCullough, Esq., SC Bar No. 13722
McCULLOUGH KHAN, LLC
2036 eWall Street
Mount Pleasant, SC 29464
(843) 937-0400
(843) 937-0706 (fax)
clay@mklawsc.com

Counsel for Respondents

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Mount Pleasant, South Carolina