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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2022-001208
Case No. 2018-CP-10-3286

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.

BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. 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 fails to support a finding of a breach of any duty of care under the Residential Landlord Tenant Act?

II. 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?

STATEMENT OF THE CASE

This is a negligence action pursuant to the South Carolina Residential Landlord Tenant Act (RLTA), S.C. Code Ann. § 27-40-10, *et seq*., by the Respondent Karolina Richardson and her daughter, the Respondent Krista Richardson. From May to September 2017, the Respondents were tenants at Oyster Park Apartments located in Mount Pleasant, South Carolina. Oyster Park Apartments is owned by the Appellant Mt. Pleasant Square Associates II, LLC d/b/a Oyster Park Apartments and was developed by the Appellant Dewberry Capital Corporation ("Dewberry"). During the time the Respondents lived at Oyster Park Apartments, it was managed by the Appellant GREP Southeast, LLC ("Greystar").

By way of background, the Respondents moved into Unit 104 at Oyster Park Apartments on May 17, 2017. (R. 317). Unit 104 experienced external flooding from a storm that occurred on or about May 23, 2017. (R. 317-318, 795). As a result of the flooding, the property manager (Greystar) moved the Respondents from Unit 104 to Unit 101 on May 26, 2017. (R. 318-319, 339).

On July 10, 2017, Karolina Richardson reported by email to the property manager (Kathlina Sampson) that she discovered "black mold" in Unit 101. Her email states in part:

> For the past couple of weeks we have smelled mold/mildew, but have assumed it was innocent. At the same time my daughter and I have been suffering from severe allergy symptoms. As of yesterday I noticed black mold on the bathroom CEILING – assume to be from upstairs. Today we notice black mold from behind washer. I need this addressed today.

(R. 323, 341-342, 1106-1107). That email was sent at 2:31 a.m. Karolina Richardson received a reply remail at 11:47 a.m. on that same date from Kathlina Sampson stating that they "have initiated the necessary steps to address this issue with the utmost haste." (R. 1105). July 10th was the first day Karolina Richardson noticed any mold. (R. 331). The property manager moved the Respondents on July 12th or 13th to another unit, specifically Unit 102. (R. 326, 365). The property manager also initiated remedial action, including retaining Cyrus Higgs to perform mold testing which was done immediately on July 10, 2017. (R. 364, 629). Additionally, the property manager made contact with Belfor for remediation services on July 10, 2017, with a contract being entered on the following day. (R. 365, 634-636). The remediation was begun on July 14th and completed by July 18th. (R. 584-587). Thus, remediation of Unit 101 was completed within eight days of Karolina Richardson having provided notice of the "black mold."

The Respondents were moved out of Unit 101 to Unit 102 on July 12th or 13th. (R. 326, 365). They never had any issues with mold or water intrusion in

Unit 102. (R. 339-340). They were never required to move back to Unit 101; they remained in Unit 102. The Respondents eventually moved out of Oyster Park Apartments on Labor Day in 2017. (R. 335).

As a result of their tenancy at the Oyster Park Apartments, the Respondents filed suit against the Appellants on June 27, 2018. The causes of action included the RLTA negligence claim as well as claims for a violation of the South Carolina Unfair Trade Practices (SCUTPA), negligent misrepresentation, fraudulent misrepresentation, and civil conspiracy.

Following the completion of discovery, the case proceeded to trial before Circuit Court Judge Jennifer McCoy and a jury on July 18, 2022. At the close of the Respondents' case-in-chief, the Appellants moved for a directed verdict as to all causes of action. (R. 479-504). The trial court granted a directed verdict as to the SCUTPA and civil conspiracy claims but denied a directed verdict as to the RLTA negligence claim. (R. 482, 494, 501). The trial court also took under advisement the directed verdict motion as to the negligent misrepresentation and fraudulent misrepresentation claims. Subsequently, the Respondents withdrew their claims for negligent misrepresentation and fraudulent misrepresentation. (R. 256). After the close of all of the evidence, the Appellants renewed their directed verdict motion, which was denied. (R. 524).

The case was presented to the jury on the RLTA negligence claim only. (R. 511-514). The jury ultimately returned a verdict of $850,000 actual damages for the Respondent Karolina Richardson and $150,000 actual damages for the Respondent Krista Richardson. (R. 22, 526-527). The jury allocated fault among the Appellants as follows: 35 percent as to Mt. Pleasant Square Associates II, LLC d/b/a Oyster Park Apartments, 30 percent as to Dewberry Capital Corporation, and 35 percent as to GREP Southeast, LLC. (R. 23, 533-534).

Following the verdict, on July 29, 2022, the Appellants filed a motion for judgment notwithstanding the verdict (JNOV) contending that the evidence presented fails to support a finding of a breach of any duty of care under the Residential Landlord Tenant Act. (R. 254-262). That motion was summarily denied by Judge McCoy by Order filed August 24, 2022. (R. 7-8).

On August 29, 2022, the Appellants filed a timely Notice of Appeal to this Court.

Thereafter, on December 8, 2022, Judge McCoy issued an Order Granting Plaintiff's Motion for Sanctions Pursuant to Rule 37(b)(2)(C), SCRCP, finding that the Appellants had committed a discovery violation and awarding sanctions in the amount of $25,200. (R. 9-13). The Appellants filed a Rule 59(e) motion to alter or amend and/or motion to reconsider as to that sanctions order. (R. 265-269). The appeal was held in abeyance to allow Judge McCoy to consider the Appellants' Rule

59(e) motion. That motion was heard on January 19, 2023, and Judge McCoy issued an Order denying that motion on June 6, 2023. (R. 14-17).

The Appellants thereafter filed a timely Amended Notice of Appeal to this Court.

STANDARD OF REVIEW

The standard of review for questions of law is *de novo*. The appellate court "may reverse where the decision is affected by any error of law." *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454, 457 (Ct. App. 2011). The appellate courts are "free to decide matters of law with no particular deference to the fact finder." *Id.*

"In an action at law, on appeal of a case tried by a jury, [appellate courts] may only correct errors of law. The factual findings of the jury will not be disturbed unless no evidence reasonably supports the jury's findings." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135, 142 (2010).

“The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court.” *Karppi v. Greenville Terrazzo Co.*, *Inc.*, 327 S.C. 538, 489 S.E.2d 679, 681 (Ct. App. 1997). “A trial court’s exercise of its discretionary powers with respect to sanctions imposed in discovery matters will be interfered with by the Court of Appeals only if an abuse of discretion has occurred.” *Id.* “The burden is upon the party appealing from the order to demonstrate the trial court abused its discretion.” *Id.* “An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law.” *Id.*

<u>ARGUMENTS</u>

I. The trial court erred in denying the Appellants' motions for directed verdict and JNOV on the Respondents' negligence claim brought pursuant to the Residential Landlord Tenant Act.

The jury returned a verdict on the Respondents' negligence claim brought pursuant to the South Carolina Residential Landlord Tenant Act (RLTA), S.C. Code Ann. § 27-40-10, *et seq*. This cause of action is not recognized at common law. In *Pryor v. Northwest Apartments, Ltd.*, 321 S.C. 524, 469 S.E.2d 630 (Ct. App. 1996), this Court pointed out that "[t]he RLTA creates a new cause of action not found at common law." 469 S.E.2d at 633. In *Watson v. Sellers*, 299 S.C. 426, 385 S.E.2d 369 (Ct. App. 1989), this Court explained that at common law "the relationship of landlord and tenant, by itself, imposes no legal duty on the part of the landlord to keep in repair leased residential premises under the control of the tenant." 385 S.E.2d at 372. Further, this Court found that "the RLTA is in derogation of common law and, therefore, the statute should be strictly construed." 385 S.E.2d at 373. *See also*, *Young v. Morrisey*, 285 S.C. 236, 329 S.E.2d 426, 428 (1985) ("[t]raditionally, under the law of South Carolina, a landlord owes no duty to maintain leased premises in a safe condition"); *Robinson v. Code*, 384 S.C. 582, 682 S.E.2d 495, 496 (Ct. App. 2009) (same).

In *Watson*, *supra*, this Court held that "the RLTA by express words creates a cause of action in tort in favor of a tenant of residential property against his landlord for failure, after notice, to make necessary repairs and to do what is reasonably necessary to keep the premises in a habitable condition." *Watson*, 385 S.E.2d at 373. This Court in *Watson* explained that "[t]he principal statute which creates a cause of action is Section 27-40-440 wherein it is provided in pertinent part that '[a] landlord shall …make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition.'" 385 S.E.2d at 374, *citing* S.C. Code Ann. § 27-40-440(a)(2).

Critically, the duties owed by the landlord arise only "after notice." The RLTA specifically provides that a tenant's rights "do not arise until he has given notice to the landlord and the landlord fails to act within a reasonable time." S.C. Code Ann. § 27-40-630(d). The RLTA requires "delivery of 'a written notice to the landlord specifying the acts and omissions constituting the breach.'" *Robinson*, 682 S.E.2d at 497, *citing* S.C. Code Ann. § 27-40-610(a). Without notice, the landlord owes no duty to repair. *Watson*, 385 S.E.2d at 375. The RLTA provides for a private right of action in Section § 27-40-610(b) as follows: "the tenant may recover actual damages and obtain injunctive relief in a magistrate's court or

circuit court, without posting bond, for any noncompliance by the landlord with … § 27-40-440." S.C. Code Ann. § 27-40-610(b).[1]

The trial court charged Section 27-40-440(a) as the source of the legal duties owed by the Appellants. (R. 512-513). Section 27-40-440(a) states:

> (a) A landlord shall:
>
> (1) comply with the requirements of applicable building and housing codes materially affecting health and safety;
>
> (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, and, for premises containing more than four dwelling units, keep in a reasonably clean condition;
>
> (4) make available running water and reasonable amounts of hot water at all times and reasonable heat except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection;

[1] Notably, the trial court erred in submitting the issue of punitive damages to the jury. Punitive damages, however, are not recoverable under the RLTA. Section 27-40-610 only authorizes the recovery of actual damages and not punitive damages. There was no harm, however, because the jury found that punitive damages were not warranted. (R. 545-546).

> (5) maintain in reasonably good and safe working order and condition all electrical, gas, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by him. Appliances present in the dwelling unit are presumed to be supplied by the landlord unless specifically excluded by the rental agreement. No appliances or facilities necessary to the provision of essential services may be excluded.

S.C. Code Ann. § 27-40-440(a). The trial court also charged subsection (b) which states: "(b) If the duty imposed by paragraph (1) of subsection (a) is greater than any duty imposed by any other paragraph of that subsection, the landlord's duty must be determined by reference to paragraph (1) of subsection (a)." S.C. Code Ann. § 27-40-440(b). (R. 513). The trial court provided no other instructions on the duty of care other than what was read verbatim from Section 27-40-440.

At the close of the Respondents' case-in-chief, the Appellants made a motion for directed verdict on the RLTA negligence claim. (R. 480-482). The trial court denied that motion based on the testimony of the Respondent Karolina Richardson and another tenant, Oba Mubarak, finding that "they both testified to conditions that were poor." (R. 482). The trial court further ruled: "whether or not they found [sic] the landlord to live up to the duties of the Landlord Tenant Act is totally up to the jury to decide. It's not a legal conclusion that I can reach based on the testimony that's been brought out." (R. 482). Without stating any specifics,

the trial court concluded that "[t]here's at least some evidence in the record that presents an issue of facts [sic] for the jury." (R. 482). The Respondents later renewed that directed verdict motion, and it was similarly denied. (R. 524).

Following the $1 million verdict, the Appellants made a post-trial JNOV motion which renewed the same arguments made at the directed verdict stage. (R. 254-262). By written order filed August 24, 2022, the trial court denied the JNOV motion. The court found that "there was substantial evidence in support of Plaintiffs' claim, and the jury weighed the evidence presented at trial and reached a reasonable conclusion as to the value of Plaintiffs' damages suffered as a proximate result of Defendants' conduct." (R. 8). The trial court did not address with specificity the "substantial evidence" to which it referred.

Moreover, the trial court did not state with any specificity what duties of care under Section 27-40-440(a) were breached nor the evidence supporting each such breach. However, a careful review of the record, including the testimony and exhibits admitted during the Respondents' case-in-chief, clearly demonstrates the absence of any evidence to support a finding that the Appellants violated the duties of care outlined in Section 27-40-440(a).

A. <u>Section 27-40-440(a)(1)</u>

Section 27-40-440(a)(1) requires the landlord to "comply with the requirements of applicable building and housing codes materially affecting health and safety." S.C. Code Ann. § 27-40-440(a)(1). The Respondents never offered any evidence as to any applicable building and/or housing codes. Such codes were never identified to the jury. There were no codes placed into evidence. There was no testimony offered by either a lay or expert witness as to what any codes require or that any codes were breached and the breach not remedied. In short, the record is devoid of any evidence to support a finding that a duty of care under Section 27-40-440(a)(1) was owed or breached. In fact, the term "codes" does not appear in the trial transcript. Moreover, the trial court never charged the jury as to any applicable "building and housing codes," and frankly, the existence of such codes needs to be presented by admission of the local ordinances adopting such codes. *See*, *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 344 S.E.2d 869, 872 (Ct. App. 1986) (holding the trial court erred in charging the jury that a violation of a standard building code is negligence *per se* where plaintiffs failed to offer evidence that the municipality passed an ordinance adopting the building code because courts will not take judicial notice of an ordinance). No such ordinances are in evidence. For each of these reasons, the trial court erred in denying the directed

verdict and JNOV motions with respect to the duties set forth in Section 27-40-440(a)(1).

B. <u>Section 27-40-440(a)(2)</u>

Section 27-40-440(a)(2) requires the landlord to "make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition." S.C. Code Ann. § 27-40-440(a)(2). The "fit and habitable" provision has been interpreted to apply only to "the inherent physical qualities of the premises." *Fair v. United States*, 334 S.C. 321, 513 S.E.2d 616, 617 (1999). To recap, a tenant's rights "do not arise until he has given notice to the landlord and the landlord fails to action within a reasonable time." S.C. Code Ann. § 27-40-630(d). Section 27-40-610(a) requires that "noncompliance with § 27-40-440 materially affecting health and safety or the physical condition of the property" must be remedied within fourteen days or remedial measures must at least be commenced within fourteen days. S.C. Code Ann. § 27-40-610(a). In the event of fire or casualty damage to the premises, the tenant's remedy is outlined in Section 27-40-650, but that section does not place any duty nor time restraints on the landlord to make repairs. S.C. Code Ann. § 27-40-650.

The evidence presented in the Respondents' case-in-chief does not support a violation of Section 27-40-440(a)(2). In denying the directed verdict motion, the

trial court pointed only to the testimony of Karolina Richardson and Oba Mubarak and specifically that "both testified that the conditions were poor." (R. 482). While it is unclear what the trial court was specifically referring to, the mere existence of "poor conditions" is not actionable under the RLTA. In order for the Respondents to prevail, the landlord needed to be provided written notice of the "poor conditions" and to have failed to take remedial action within a reasonable time. The evidence, including the testimony of Karolina Richardson and Oba Mubarak, does not support such a finding.

Oba Mubarak was another tenant at Oyster Park Apartments, but his tenancy was over a year *after the Respondents had moved away*. The Respondents presented testimony from Mubarak about concerns his family had with mold. The evidence presented includes an email chain beginning on January 16, 2019 and ending on January 21, 2019. (R. 347, 1020-1023). The Respondents vacated the premises on Labor Day in 2017. While the evidence presented through Oba Mubarak may have had some relevance for the Respondents' SCUPTA claim, it has no relevance for their RLTA claim. The trial court erred in considering the Mubarak testimony as providing any support for the Respondents' RLTA claim.

As for the testimony of the Respondent Karolina Richardson (hereafter referred to as "Karolina" to distinguish her from her daughter Krista), she and her daughter moved into Unit 104 at Oyster Park Apartments on May 17, 2017. (R.

317). Unit 104 experienced external flooding from a storm that occurred on or about May 23, 2017. (R. 317-318, 795). As a result of the flooding, the property manager (Greystar) moved the Respondents from Unit 104 to Unit 101 on May 26, 2017. (R. 318-319, 339).

On July 10, 2017, Karolina reported by email to the property manager (Kathlina Sampson) that she discovered "black mold" in Unit 101. Her email states in part:

> For the past couple of weeks we have smelled mold/mildew, but have assumed it was innocent. At the same time my daughter and I have been suffering from severe allergy symptoms. As of yesterday I noticed black mold on the bathroom CEILING – assume to be from upstairs. Today we notice black mold from behind washer. I need this addressed today.

(R. 323, 341-342, 1106-1107). That email was sent at 2:31 a.m. Karolina received a reply remail at 11:47 a.m. on that same date from Kathlina Sampson stating that they "have initiated the necessary steps to address this issue with the utmost haste." (R. 1105). July 10th was the first day Karolina noticed any mold. (R. 331). The property manager moved the Respondents on July 12th or 13th to another unit, specifically Unit 102. (R. 326, 365). The property manager also initiated remedial action, including retaining Cyrus Higgs to perform mold testing which was done immediately on July 10, 2017. (R. 364, 629). Additionally, the property manager made contact with Belfor for remediation services on July 10, 2017, with a contract

being entered on the following day. (R. 365, 634-636). The remediation was begun on July 14th and completed by July 18th. (R. 584-587). Thus, remediation of Unit 101 was completed within eight days of Karolina providing notice of the "black mold."

As indicated, the Respondents were moved out of Unit 101 to Unit 102 on July 12th or 13th. (R. 326, 365). They never had any issues with mold or water intrusion in Unit 102. (R. 339-340). They were never required to move back to Unit 101; they remained in Unit 102. The Respondents eventually moved out of Oyster Park Apartments on Labor Day in 2017. (R. 335).

The foregoing summary is undisputed in the record. While the Respondents may have experienced frustration with having twice to change units, that is not actionable under the RLTA. Instead, the duty owed under RLTA and specifically Section 27-40-440(a)(2) was to make repairs and do what was reasonably necessary to provide premises in a fit and habitable condition. After the flooding event (which qualifies as a casualty event under Section 27-40-650), the Respondents were moved to another unit. Next, when the Respondents noticed an issue with mold in Unit 101, they were promptly moved from the unit within two to three days, which satisfies the fourteen-day requirement of Section 27-40-610(a) and the reasonable time requirement of Section 27-40-630(d). Remedial action was immediately commenced on the date notice was provided, that being July 10,

2017, with mold testing being performed that day as well as the initial contact being made with a remediation contractor who began and completed the remediation within eight days. That did not actually impact the Respondents because they were not moved back to Unit 101 but rather remained in Unit 102, for which they did not report any issues materially affecting health and safety. Based on that undisputed evidence, the trial court erred in denying the directed verdict and JNOV motions with respect to the duties set forth in Section 27-40-440(a)(2).

C. <u>Section 27-40-440(a)(3)</u>

Section 27-40-440(a)(3) requires the landlord to "keep all common areas of the premises in a reasonably safe condition" and to keep all common areas "in a reasonably clean condition." S.C. Code Ann. § 27-40-440(a)(3). It is unclear why the trial court even charged this duty to the jury. Certainly, there is no evidence that this case involved any issues with the common areas. The common areas are never addressed by the allegations or the evidence. The trial court erred in denying the directed verdict and JNOV motions with respect to the duties set forth in Section 27-40-440(a)(3).

D. <u>Section 27-40-440(a)(4)</u>

Section 27-40-440(a)(4) requires the landlord to provide running water, including hot water, and "reasonable heat." S.C. Code Ann. § 27-40-440(a)(4). Again, is unclear why the trial court even charged this duty to the jury. The case does not involve those issues. The Respondents did not allege that they were denied running water or a supply of hot water. Likewise, the case does not involve the absence of heat. The Respondents lived at Oyster Park Apartments from May 2017 through early September 2017, and there was no evidence that heat was needed or turned on during those warm weather months. The trial court erred in denying the directed verdict and JNOV motions with respect to the duties set forth in Section 27-40-440(a)(4).

E. <u>Section 27-40-440(a)(5)</u>

Section 27-40-440(a)(5) requires the landlord to "maintain in reasonably good and safe working order and condition all electrical, gas, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances." S.C. Code Ann. § 27-40-440(a)(5). Again, it is unclear why the trial court even charged this duty to the jury. The case does not involve those issues. The Respondents did not allege any issues with the utilities or appliances, and certainly there is no evidence that would support a finding of proximate cause for the Respondents'

claimed damages including their medical ailments. In short, the trial court erred in denying the directed verdict and JNOV motions with respect to the duties set forth in Section 27-40-440(a)(5).

In conclusion, a vast majority of the evidence presented by the Respondents in their case-in-chief was directed at non-RLTA claims, including the SCUPTA claim, the civil conspiracy claim, and the fraud/negligent misrepresentation claims. Yet, those claims were not submitted to the jury, and obviously the $1 million verdict was not returned on those claims and cannot be upheld based on evidence that is not relevant or material to the RLTA claim. The Respondents voluntarily dismissed the fraud/negligent misrepresentation claims and have not appealed the trial court's dismissal of the SCUPTA and civil conspiracy claims. Accordingly, those rulings constitute the law of the case. *See*, *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("an unappealed ruling, right or wrong, is the law of the case"). To be clear, a fair and careful review of the evidence presented in the Respondents' case-in-chief shows that the Respondents did not present any evidence proving their RLTA claim. As outlined above, the evidence simply does not address or otherwise support a finding of a breach of any duty of care under the RLTA, and for that reason, the Appellants are each entitled to judgment as a matter of law.

II. The trial court abused its discretion in finding that the Appellants committed a discovery violation and in awarding sanctions in the amount of $25,200.

The Appellants also appeal from the trial court's Order Granting Plaintiffs' Motion for Sanctions Pursuant to Rule 37(b)(2)(C), SCRCP, as well the subsequent Order Denying Defendants' Motion to Alter or Amend Order and/or Motion to Reconsider. With those orders, the trial court imposed monetary sanctions totaling $25,200 against the Appellants, representing costs for an ESI document production that had been ordered by the trial court as well as attorney's fees and paralegal fees for reviewing documents produced as part of the ESI document production. The Appellants cite several errors that warrant the reversal of those orders and the sanctions award.

Under South Carolina law, "[t]he imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 489 S.E.2d 679, 681 (Ct. App. 1997). "A trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters will be interfered with by the Court of Appeals only if an abuse of discretion has occurred." *Id.* "The burden is upon the party appealing from the order to demonstrate the trial court abused its discretion." *Id.* "An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to

the rights of appellant, thereby amounting to an error of law." *Id.*

In its initial sanctions order, the trial court found that on July 14, 2022, four days before trial was to begin, counsel for the Appellants learned of notebooks that contained mold complaints at Oyster Park Apartments. Counsel reported those notebooks to Respondents' counsel and produced copies the following days. The Appellants had throughout the discovery process produced thousands of pages of documents including mold complaints by residents and other complaints. In compliance with a Form Order filed January 11, 2021, the parties engaged in agreed-upon ESI searches for documents including mold complaints. With the opposition memorandum filed on July 17, 2022, together with the exhibits filed with that memorandum, the Appellants explained that the documents at issue in the Motion for Sanctions had been previously produced during other document productions including the production of approximately 136,000 pages of ESI discovery. While the Respondents argued that the new production included an additional 50 to 60 mold complaints by residents at Oyster Park Apartments that had not been previously produced, the Respondents presented *no evidence to support that assertion*. The record simply includes the argument of counsel, and of course, the assertions or arguments of counsel are not evidence. *See*, *McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E.2d 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will

not be considered"); *Bowers v. Bowers*, 304 S.C. 65, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are ... not evidence"); *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986).

Yet, the trial court treated counsel's unsworn representation that the new production included an additional 50 to 60 mold complaints as proven fact. The Appellants objected to that finding of fact and argued that the trial court, before awarding discovery sanctions of $25,200, should have required the Respondents to present admissible evidence that there were documents produced on July 15, 2022, that had not been previously produced and available to the Respondents' counsel. In addition, the trial court ruled that the Respondents had violated the Form Order entered January 11, 2021, but the trial court did not cite to any specific ruling in that Form Order that was violated or how it was violated by the production made on July 15, 2022. As reference to that Form Order demonstrates, there was no violation of that prior order.

In addition, in its Order Granting Plaintiffs' Motion for Sanctions Pursuant to Rule 37(b)(2)(C), SCRCP, the trial court correctly sets forth that standard for determining whether a discovery issue warrants sanctions and what an appropriate sanction would be. *See*, *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d 12 (1974) (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"). However, despite setting forth the proper factors to be considered and weighed, the trial court did not weigh the required factors nor make findings that address each of those factors nor provide any analysis that demonstrates that the court appropriately exercised its discretion.

It is well settled that a failure to exercise discretion amounts to an abuse of that discretion. *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565, 566 (1987) ("[w]hen the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred"). The case of *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), is instructive. In that case, this Court explained as follows: "Although the trial judge in this case correctly framed the issue as discovery abuse, he did not weigh the required factors. A failure to exercise discretion amounts to an abuse of discretion." 495 S.E.2d at 216. *See also*, *State v. Smith*, 276 S.C. 494, 280 S.E.2d 200, 202 (1981) ("the mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis that discretion was exercised").

In the case at bar, the trial court failed to exercise discretion. The trial court's sanctions orders show that the court did not weigh the required factors. In particular, the trial court did not address specifically whether the Appellants produced new documents on July 15, 2022, what those new documents were, or

the prejudice that resulted to the Respondents. Moreover, even if the Respondents' unsworn and unsupported representation that the new production included 50 to 60 additional mold complaints by other residents was accepted as true, the Respondents never argued nor demonstrated that there was any new admissible evidence provided which had any impact on the Respondents' case or trial strategy. To the contrary, none of the mold complaints which formed the basis for the Motion for Sanctions was admissible evidence at trial. In effect, the trial court never addressed the existence of prejudice that resulted to the Respondents that warranted the award of monetary sanctions under the prevailing standard. That abuse of discretion warrants a reversal of that award.

Furthermore, the Appellants challenge the amount of the award. The trial court outlined the factors to be considered in an award of attorney's fees, but the court made no findings as to those factors. Even in response to the Appellants' Rule 59(e) motion, the trial court still refused to address those factors. Instead, in a conclusory manner, the trial court states only that the "attorneys' fees and costs requested by Plaintiffs are reasonable." (R. 11). Moreover, the trial court failed to make any findings to show that the fees and costs claimed for the ESI document productions that the Respondents had previously sought are causally related and therefore properly awarded as sanctions for the July 15, 2022 production at issue. Notably, while the trial court's sanctions order refers to the filing of an affidavit of

Clayton B. McCullough, there is no entry on the Public Index showing that such an affidavit was ever filed or is even part of the trial court record. With that affidavit having never been filed, there is no evidentiary basis for the trial court's award of monetary sanctions, and on that additional basis, the award should be reversed.

Finally, of the $25,200 in sanctions awarded, $11,700 was purportedly in reimbursement of paralegal fees billed at a rate of $195 per hour. The trial court, however, never made any finding that a reasonable paralegal rate in the Charleston market is $195 per hour nor was there any evidence provided to support that rate. Additionally, the trial court erred generally in awarding any non-attorney's fees. In *O'Shields v. Columbia Automotive, LLC*, 435 S.C. 319, 867 S.E.2d 446 (Ct. App. 2021), the Court of Appeals provided direction on remand for the trial court to redetermine its award of attorney's fees and specifically directed that "[t]he circuit court should eliminate any redundant fees, improper cost, and *paralegal fees* as it had in the previous award." 867 S.E.2d at 457. (Emphasis added). Thus, as this Court has ruled in *O'Shields*, the award in the case at bar should not have included non-lawyer time, including fees for paralegals, legal assistants, and any other non-professional staff members.[2]

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[2] The Appellants recognize that the *O'Shields* case involved claims on which North Carolina substantive law was applicable. In ruling that paralegal fees are not recoverable, this Court did not reference a specific North Carolina case for that proposition. At any rate, the premise that an attorney's fees award should not include paralegal fees unless authorized by statute is a valid premise, and one the *O'Shields* decision supports.

For each of the foregoing reasons, the trial court abused its discretion in making a sanctions award of $25,200. That award should be reversed.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants Mt. Pleasant Square Associates, II, LLC d/b/a Oyster Park Apartments, Dewberry Capital Corporation, and GREP Southeast, LLC respectfully request that the Court reverse the jury verdict and the orders entered by Circuit Court Judge Jennifer McCoy denying the Appellants' motions for directed verdict and for judgment notwithstanding the verdict. The Appellants further request that the Court reverse the orders of Judge McCoy granting discovery sanctions in favor to the Respondents. The Appellants request that the Court remand for entry of judgment as a matter of law in favor of the Appellants.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellants certifies that the Final Brief of Appellants complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the undersigned employee of Lindemann Law Firm, P.A., counsel for the Appellants, does hereby certify that service of the **Brief of Appellants** in the above-captioned matter was made upon all counsel of record by email only this the 16th day of January 2024, as follows:

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