STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY

Court of Common Pleas

The Honorable H. Steven DeBerry, IV, Circuit Court Judge

Appellate Case No. 2023-001713

Barbara L. Sarb…… Respondent/Appellant,

v.

Julie W. Phillips and Joseph M. Phillips……Appellants/Respondents.

INITIAL BRIEF OF RESPONDENT/APPELLANT *AS RESPONDENT*

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STATEMENT OF ISSUES ON APPEAL

I. **Whether there is evidence in the record to support the jury's verdict against the Phillips for violation of the South Carolina Residential Property Condition Disclosure Act where the Phillips had knowledge of defects with the Subject Property; where the Phillips made false, incomplete, or misleading disclosures to Sarb; and where Sarb reasonably relied on those misrepresentations.**

II. **Whether Sarb was the "prevailing party" after the jury found the Phillips liable to Sarb for violating the South Carolina Residential Property Condition Disclosure Act.**

STATEMENTS OF THE CASE AND FACTS

Respondent/Appellant, Barbara L. Sarb (hereinafter "Sarb") adopts and incorporates by reference the Statements of the Case and Facts presented in her Initial Brief as Appellant, which is of record with the Court.

STANDARD OF REVIEW

A. Directed Verdict/Judgment Notwithstanding the Verdict[1]

"On review from a trial court's denial of a motion for directed verdict or judgment notwithstanding the verdict (JNOV), this Court applies the same standard as the trial court and views the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *See Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016) (citing *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 28, 602 S.E.2d 772, 782 (2004)). "In deciding motions for a directed verdict or judgment notwithstanding the verdict, the trial judge must

[1] In the Phillips' Initial Brief, they reference the standard of review on a motion for a new trial, presumably because it is the same standard of review for review of motions for JNOV. However, the Phillips' Statement of Issues on Appeal and supporting arguments are solely related to the trial court's denial of their motion for JNOV. (Appellants/Respondents' Initial Brief). As such, the Phillips have waived their right to seek review of the trial court's ruling on their motion for a new trial.

consider the evidence in the light most favorable to the nonmoving party." *Brady Dev. Co. v. Town of Hilton Head Island*, 312 S.C. 73, 78, 439 S.E.2d 266, 269 (1993).

B. Award of Attorney's Fees

The review of attorney fees awarded pursuant to a contract or statute is governed by an abuse of discretion standard. *See Laser Supply & Servs., Inc. v. Orchard Park Assocs*., 382 S.C. 326, 340, 676 S.E.2d 139, 147 (Ct. App. 2009); *Blumberg v. Nealco*, 310 S.C. 492,493, 427 S.E.2d 659, 660 (1993). "[A]n abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support." *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565 (1987); The decision to award or deny attorney's fees under a statute allowing attorney's fees to the prevailing party will not be disturbed on appeal absent an abuse of discretion by the trial court in considering the applicable factors set forth by the statute. *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008).

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED THE PHILLIPS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE EVIDENCE SUBMITTED AT TRIAL SUPPORTED THE JURY'S VERDICT.

A. The Phillips' appellate contention that Sarb failed to prove by a preponderance of the evidence that the Phillips had "actual knowledge" of defects to the Subject Property is not preserved for appeal.

The Phillips first argue that Sarb failed to present sufficient evidence that they had actual knowledge of a problem, and therefore Sarb could not prove that the Phillips made false or misleading disclosures pursuant to the South Carolina Residential Property Condition Disclosure Act, S.C. Code Ann. § 27-50-10 *et seq*. (the "Disclosure Act"). This issue relating to the Phillips'

actual knowledge is being raised for the first time on appeal, and thus cannot be considered by this Court.

Our Courts "have adhered to the rule that where an issue has not been ruled upon by the trial judge nor raised in a post-trial motion, such issue may not be considered on appeal." *Pelican Building Centers of Horry-Georgetown, Inc. v. Button*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993); *see Marsh v. South Carolina Dept. of Highways and Public Transp.*, 298 S.C. 420, 380 S.E.2d 867 (Ct. App 1989) (noting that alternative motions for new trial that simply mirrors a motion for judgment notwithstanding the verdict are limited to the grounds stated in the motions for directed verdict).

In arguing their directed verdict motion, the Phillips failed to raise the issue of whether Sarb presented sufficient evidence of Phillips' knowledge of any defects with the Subject Property in order to submit the claim to the jury. (*See* T2 at 378:18-25; 379-386:1-20). Similarly, the Phillips presented five (5) grounds for the basis of their motion for JNOV or in the alternative, new trial, yet completely omitted any argument pertaining to any knowledge element. (Def. Mot. JNOV). Thus, the Phillips failed to preserve this issue in their post-trial motions and are precluded from raising this argument for the first time on appeal. This ground for appeal should therefore be denied and rejected.

B. Notwithstanding the Phillips' failure to preserve the knowledge argument, there is sufficient evidence in the record to support the jury's finding that the Phillips knowingly made misrepresentations on the Disclosure Statement.

Notwithstanding the aforementioned error preservation concerns and without waiving same, the Phillips' argument fails because there is more than sufficient evidence in the record to support the jury's findings of fact that the Phillips had knowledge of a defect to the Subject

Property and, therefore, knowingly made false, incomplete or misleading disclosures in violation of the Disclosure Act. Under the Disclosure Act, "[a]n owner who knowingly violates or fails to perform any duty prescribed by any provision of this article or who discloses any material information on the disclosure statement that he knows to be false, incomplete, or misleading is liable for actual damages proximately caused to the purchaser and court costs." S.C. Code Ann. § 27-50-65.

Sarb contests the necessity of the Phillips having "actual knowledge" of the Subject Issues to establish liability under the Disclosure Act. To incur liability, Sarb needed to demonstrate that the Phillips knowingly provided false, incomplete, or misleading information on the disclosure statement, whether through actual or constructive knowledge. Constructive knowledge generally means that the person should have known of the condition through the exercise of reasonable care or diligence. *See e.g.*, KNOWLEDGE, Black's Law Dictionary (11th ed. 2019); *Wimberly v. Winn-Dixie Greenville, Inc*., 252 S.C. 117, 121, 165 S.E.2d 627,629 (1969); *Langdale v. Carpets*, 395 S.C. 194,205, 717 S.E.2d 80, 86 (Ct. App. 2011).

In *Winters v. Fiddie*, this Court upheld a denial of seller's directed verdict motion with respect to a claim under the Disclosure Act, finding that there was evidence from which a jury could infer that the seller "had either actual or constructive knowledge" of the alleged condition, and the court found that there was sufficient evidence to create a jury question as to the seller's *constructive* or actual knowledge regarding the alleged condition. 394 S.C. 629,646, 716 S.E.2d 316,325 (Ct. App. 2011). (emphasis added). Similarly, the language of the Disclosure Act itself suggests that constructive knowledge suffices to establish liability. *See* S.C. Code Ann. § 27-50-40(I) ("The rights of the parties to a real estate contract concerning the property conditions of

which the owner has no actual ***or constructive*** knowledge are not impacted by this article.") (emphasis added).

There was overwhelming evidence presented at trial that the Phillips had knowledge, including actual and constructive knowledge, of the issues at the Subject Property which they failed to disclose to Sarb.

i. Groundwater Intrusion in Basement

First, Julie Phillips admitted at trial that they were aware of at least two (2) instances of water intrusion and flooding in the basement during their ownership. (T2 at 341:3-24). Moreover, the Phillips were put on notice of past water intrusion issues to the basement in 2010 before they themselves took ownership of the Subject Property. (*See* Pl. Trial Ex. 184; T2 at 328:3-10; 330:6-19). Mr. Stewart, Sarb's engineering expert, also testified that he observed evidence of water intrusion to the basement spaces of the Subject Property that predated Sarb's purchase, and various fact witness who lived in or visited the Subject Property prior to the Phillips' purchase testified that the basement was wet or flooded during periods of heavy rain. (T2 at 242:16-25; 243:1-8). Based on the foregoing, there was not only some evidence that the Phillips knew of the problems with water intrusion into the basement of the Subject Property, is the evidence was overwhelming.

ii. Sewage Disposal Systems and Plumbing

Second, there is also ample evidence that the Phillips knew that the Subject Property had problems with sewer line stoppages/backups, but didn't disclose the same to Sarb. At trial, Mrs. Phillips admitted to experiencing at least three or four sewer line stoppages/backups during her ownership of the Subject Property, including at least one instance of it backing up into the shower. (T2 at 332:2-13). She further admitted that she and her husband filed a claim with their home warranty as a result of one of these backups. (*Id.*). Sarb recalled experiencing recurrent problems

with sewer line stoppages/backups, including clogged sinks, toilets not flushing properly and debris backing up into the shower almost immediately after moving into the Subject Property. (T2 at 134:1-23). Sarb experienced these backups while residing in the home alone, whereas during the Phillips' ownership of the Subject Property, four people resided in the home. Daniel Williams, who was retained by Sarb to perform plumbing work to the Subject Property, testified at trial that he discovered a defective and rusted plumbing line that had been reduced from four (4") inches to three (3") inches as the pipe left the house toward the street. (T2 at 368:23-25; 369:1-14). He further testified that in addition to the reduction to the line, the line ran backwards, up the slope towards the street. (T2 at 370:2-25; 371:1-11). Mr. Williams, who was properly qualified as an expert in the area of plumbing, confirmed that this reverse slope would be guaranteed to cause sewage backups (T2 at 371:18-19), and that this in combination with the reduction of the line is a "double whammy" guaranteed to cause backups. (T2 at 371:24-25). backups. (T2 at 371:24-25). It was Mr. Williams' expert opinion that the line had been situated in that manner there for quite a long time, likely when it was first put down. (T2 at 372:2-9). Additionally, Mr. Williams observed a number of holes that had been cut into the line, which indicated some prior attempt to unclog the line. (T2 at 372:10-25; 373:1). Despite this, the Phillips represented on the Disclosure Statement that they were not aware of any prior issues with the plumping or the sewer systems. (Pl. Trial Ex. 3).

iii. Cockroach and Pest Infestation(s)

Third, as to the cockroach and pest infestation(s) in the Subject Property, Sarb testified she began to immediately notice a large number of roaches (approximately twenty or more a day) after moving in. (T2 at 141:9-15). She testified that live and dead cockroaches, cockroach feces and cocoons were three feet high, up to the light sockets, behind the wall coverings throughout areas

of the house. (T2 at 138:7-25; 139:9). John Sims, a licensed contractor who was performing some work to the Subject Property, also testified that, when some of the baseboard was removed in the sunroom in August 2019, he discovered a severe cockroach infestation that required immediate treatment. (*See* T2 360:7-12, 23-25; 361:1-4). Despite this severe cockroach infestation being uncovered approximately one (1) month after Sarb moved into the Subject Property, the Phillips represented on the Disclosure Statement that they were not aware of any current or prior pest infestations.

In conclusion, whether or not the Phillips deemed the past occurrences of sewage backups and flooding to be sufficient to warrant disclosure as a "problem" is irrelevant; they admitted at trial that the basement had flooded at least twice and that they experienced at least three to four sewage backups during their ownership, even filing a home warranty claim as a result of one prior backup. Even taking into account only the flooding and sewage backups to which the Phillips truthfully admitted, the evidence supported the jury's finding that the Phillips knew or should have known of the problems at the Subject Property. Despite this and evidence that they had additional incidents to which they did not admit, they deliberately misrepresented on the Disclosure Statement that they were unaware of any defects or problems with the Subject Property.

Therefore, the jury had ample evidence to conclude that the Phillips breached the Disclosure Act. Despite the Phillips' objections, the only logical conclusion the jury could draw from both Sarb's testimony and that of her expert, along with the Phillips' own admissions, was that they were aware of at least two instances of basement flooding and multiple sewage issues. Despite this awareness, they chose not to disclose these occurrences, and Sarb suffered harm as a result of relying on their representations.

C. There is sufficient evidence in the record to support the jury's findings that the misrepresentations made by the Phillips were material and Sarb reasonably relied on the same in purchasing the Subject Property.

The Phillips additionally argue that Sarb did not sufficiently demonstrate, by a preponderance of the evidence, that any inaccurate, incomplete, or deceptive disclosure made by them constituted "material information," entitling Sarb to rely upon it. The Disclosure Act "does not limit the obligation of the purchaser to inspect the physical condition of the property and improvements." S.C. Code Ann. § 27-50-80. As at common law, a buyer asserting a claim under the Disclosure Act must demonstrate that he exercised "reasonable diligence to protect [his] interests." *Moseley v. All Things Possible, Inc.*, 395 S.C. 492, 497, 719 S.E.2d 656, 659 (2011) (quoting *Slack v. James*, 364 S.C. 609, 612-13, 614 S.E.2d 636 638 (2005)). Further, the reasonableness of a party's actions is a question for the jury to decide. *See McLaughlin v. Williams*, 379 S.C. 451, 457, 665 S.E.2d 667, 670-71 (Ct. App. 2008). As this Court has explained,

> issues of reliance and reasonableness going as they do to subjective states of mind and applications of objective standards of reasonableness, are ***preeminently factual issues for the trier of facts.***

Unlimited Servs., Inc. v. Macklen Enters., Inc., 303 S.C. 384, 387, 401 S.E.2d 153, 155 (1991) (emphasis added). Most critically, "[t]he determination of what constitutes reasonable diligence and prudence must be made on a case-by-case basis." *Florentine Corp. v. PEDA I, Inc.*, 287 S.C. 382, 386, 339 S.E.2d 112,114 (1985); *cf Moseley*, 395 S.C. at 498, 719 S.E.2d at 659 ("Our jurisprudence reflects a preference for a case-by-case approach to the question of whether a hearer's reliance on misrepresentations as to matters in the public record is reasonable.")

Sarb testified at trial that she had not seen the physical Disclosure Statement at the time she first put an offer in on the Subject Property. (T2 at 166:10-17). She further testified that she still had not seen the Disclosure Statement when she executed the Purchase Agreement on June

14, 2019. (T2 at 166:18-25; 167:1-3). However, the Phillips had completed the Disclosure Statement, left it on the kitchen counter and told their real estate agent where it was on June 13, 2019, the same day they listed the Subject Property. (T2 345:6-22). Sarb testified she received verbal confirmation that there was nothing disclosed on that Disclosure Statement, which was in fact the case when she ultimately received the paper copy. (T2 at 167:3-5 171:20 – 172:2). Sarb testified she relied on the representations made in the Disclosure Statement before purchasing the Subject Property. (T2 223:11-18).

Despite the clean Disclosure Statement from the Phillips, Sarb had a home inspection performed by a licensed home inspector, Kevin Watford of HouseMaster (Pl. Trial Ex. 6), as well as a CL-100/South Carolina Wood Infestation inspection performed by Dodson Brothers Exterminating Company (Pl. Trial Ex. 4). Neither report indicated any of the groundwater infiltration to the basement, issues with the sewage disposal system and plumbing, or pest infestations. (T2 at 254:11-15); (*See generally* Pl. Trial Ex. 8); (Pl. Trial Ex. 9). The Phillips denied the existence of these problems in the Disclosure Statement (T2 at 223:14; Pl. Trial Ex. 3). Because neither the HouseMaster nor CL-100 Reports indicated these defects, Sarb had no knowledge or reason to know about the existence of such problems. Therefore, her reliance upon the Phillips' various misrepresentations on the Disclosure Statement and the verbal misrepresentation made by the Phillips prior to closing was reasonable. (T2 at 223:11-18; 254:11-15; 225:11-24; 362:19-23; 363:5-21; 100:4-25; 101:1-2).

Prior to trial, at trial, and in their Initial Brief, the Phillips rely heavily on *McLaughlin v. Williams*, 379 S.C. 451, 665 S.E.2d 667 (Ct. App. 2008), where this Court upheld the circuit court's order granting defendant's motion for summary judgment, stating there was no fraud or negligent misrepresentation on behalf of the seller or realtors. The Phillips'

reliance on *McLaughlin* is misplaced. There are significant factual differences between *McLaughlin* and the case at bar. In *McLaughlin,* the defendants simply refused to answer a number of questions on the Disclosure Statement even after the agent for the buyer requested more information. *Id.,* 379 S.C. at 450. Here, rather than answer "yes", or "no representation", the Phillips clearly marked "No" to all of the relevant items despite their actual knowledge to the contrary. (Pl. Trial Ex. 3). Further, when Sarb inquired specifically about water ever having been in the basement, the Phillips denied any such incidents. (T2 at 213:25; 214:1-8; 266:17-25; 267:1-10). The Phillips even went so far as to advertise the basement as a heated and cooled "mancave," rather than a wet basement that floods. (Def. Trial Ex. 1). Additionally, the defects claimed in *McLaughlin* were related to moisture damage to the structure of the property due to prior water intrusion. *Id.* at 454. The plaintiff in *McLaughlin* obtained a CL-100 report which showed *active* wood destroying fungi and explicitly noted "'fungi damage to wood' is 'commonly called water damage.'" *McLaughlin* at 459. The CL-100 in *McLaughlin* also reported a moisture content of at least 28% below the first main floor of the house. *Id.* In summary, McLaughlin knew or should have known about the problem Williams failed to disclose.

By contrast, in this case, Sarb had no knowledge or reason to know about the problems with the Subject Property. The CL-100 for the Subject Property obtained by Sarb only indicated the existence of *non-active* wood-destroying fungi and no evidence of excessive moisture. (Pl. Trial Ex. 4). Additionally, the Phillips' own contractor noted that the "notated item of non-active wood decaying fungi […] was evaluated and found to be superficial in nature with no structural damage," and that "no work [was] required at [that] time." (Pl. Trial Ex. 8). Further, Mr. Stewart testified that the HouseMaster Report did not indicate any evidence of moisture intrusion in the basement and that neither the HouseMaster nor the CL-100 reports identified the issues he found

that were the issues being tried. T2 at 243: 12-25; 244: 1-13; 249: 20-25; 250: 1-5; 254: 1-14). While the HouseMaster report noted decay at the front inside right corner of the roof and the rear chimney in the *attic*, as well as some damaged wood to the basement window trim and windowsill, there was no indication in any of the reports that there were issues with groundwater penetrating the *basement*. (*See generally*, Pl. Trial Ex. 5). Counsel for the Phillips even agreed that the only evidence of prior decay to the floor of the basement was provided by Mr. Stewart, who was not involved in the underlying action until well after the closing of the Subject Property. (T2 at 392:1-25). Not only was any noted wood decay near the basement area old and "non-active," but Sarb specifically asked if water had ever gone into the basement to which the Phillips responded "never." (T2 at 213:25; 214:1-8; 266:17-25; 267:1-10). It would be reasonable for Sarb to rely on both that representation as well as the same representations in the Disclosure Statement and conclude that any old damage pre-dated even the Phillips' ownership and basement water was not a problem during the Phillips' ownership. Nonetheless, the Phillips insist that any mention of the words water or moisture or any indication of rotted or decayed wood, even with regard to areas nowhere near the basement, including up by the roof, rendered Sarb's reliance on their misrepresentations unreasonable. However, there was no information contained in Sarb's inspection reports or otherwise that would have provided Sarb with knowledge contradicting the Disclosure Statement and affirmative misrepresentations by the Phillips, as it related to the groundwater intrusion to the basement.

Additionally, neither the HouseMaster Report nor the CL-100 revealed any indication of issues with sewage line stoppages/backups or a pest infestation. Rather, the deficiencies with the plumbing were not discovered until Sarb's expert, Daniel Williams, dug up the lines and ultimately discovered the reduction in the plumbing line, the reverse slope, and evidence of prior efforts to

unclog the line. (T2 at 368:23-25; 369:1-14; 371:18-19; 372:4-6). Sarb had no knowledge of the pest infestation until she moved in and witnessed many cockroaches in the house, something only one residing in the home would notice, and not necessarily something one would notice during a short visit. Further, Sarb didn't discover the severity of the infestation until removing the wall paneling, which revealed an obvious long-term infestation as there were both live and dead cockroaches, cockroach feces and cocoons three feet up the walls, to the light sockets. As such, there were no indications on either the HouseMaster or CL-100 reports that would put Sarb on notice that she could not reasonably rely on the Disclosure Statement. *McLaughlin* is wholly distinguishable from the case at bar.

While the facts of the case are notably different than in *McLaughlin*, this Court should also be mindful that the Disclosure Statement itself recommends that buyers secure their own, independent inspections, thus notifying buyers that the representations of the Phillips should not be the sole basis of their due diligence. Despite the Phillips' argument made at trial and in their Initial Brief, securing an inspection should not be seen as voiding the importance of the Disclosure Statement required by statute. (App/Resps' Initial Br., Section I(B); T2 at 383:2-18). If it was, only buyers who failed to get the recommended inspection could sue for misrepresentation, and their claim would be barred for failing to obtain an independent inspection. Under this circular logic, the Disclosure Act would be meaningless.

The sole purpose for the Disclosure Statement is to provide the buyer information from the seller, the person who knows the most about the history of a home and any problems with it. If anything, it also serves a basis for the inspectors to pay attention to certain areas of the home. If it cannot be relied upon, then the Disclosure Statement is useless and the legislature's intent of protecting the consumers is impeded. Where, as here, the CL-100 inspection and multiple home

inspections do not reveal defects with the property, the buyer has the right to rely on the disclosure statement. And, the seller has the obligation to render truthful information about problems that are latent or unknown, *or to make no representation at all.*[2]

The ultimate question of whether the Phillips violated the Disclosure Act rested with the jury and the jury's findings are fully supported by the evidence. The jury found that the Phillips misrepresented the condition of the Subject Property, that Sarb reasonably relied on the Phillips' misrepresentations, and ultimately that the Phillips violated the Disclosure Act. (Verdict Form). Thus, this Court must affirm the trial court's proper denial of the Phillips' JNOV motion.

II. THE TRIAL COURT DID NOT ERR IN AWARDING ATTORNEY'S FEES AND COSTS TO SARB AS THE PREVAILING PARTY UNDER THE DISCLOSURE ACT.

The Phillips' secondary grounds for appeal regarding the trial court's decision to award Sarb a portion of her requested attorney's fees and costs pursuant to the Disclosure Act similarly lacks merit. The Disclosure Act provides:

> An owner who knowingly violates or fails to perform any duty prescribed by any provision of this article or who discloses any material information on the disclosure statement that he knows to be false, incomplete, or misleading is liable for actual damages proximately caused to the purchaser and court costs. ***The court may award reasonable attorney fees incurred by the prevailing party.***

S.C. Code Ann. § 27-50-65. (emphasis added).

In general, statutes that permit prevailing parties to recover attorney's fees and costs from the losing party are known as fee-shifting statutes. *See Layman v. State*, 376 S.C. 434, 452, 658 S.E.2d 320, 329 (2008). Courts generally hold that a "lodestar" approach reflecting the amount of attorney time reasonably expended on the litigation results in a reasonable fee under a fee-shifting

[2] As the seller in *McLaughlin* did and which is an option on the South Carolina Residential Property Condition Disclosure Statement form promulgated by the Department of Labor, Licensing and Regulation.

statute. *Id.* (*citing Blum v. Stenson,* 465 U.S. 886, 900, 104 S. Ct. 1541, 1549, 79 L. Ed. 2d 891 (1984)). In the context of fee-shifting statutes, the term "prevailing party" means the party who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention, and who is the one in whose favor the decision or verdict is rendered and judgment entered. *Seckinger v. Vessel Excalibur*, 326 S.C. 382, 389, 483 S.E.2d 775, 778 (Ct. App. 1997). Indeed, our Supreme Court has held that a party "need not be successful as to all issues in order to be found to be a prevailing party" for purposes of awarding attorney's fees under a fee-shifting statute. *Layman,* 376 S.C. at 459, 658 S.E.2d at 333 (*citing Heath v. Cnty. of Aiken*, 302 S.C. 178, 181, 394 S.E.2d 709, 711 (1990)). Rather, where a statute shifts the source of the prevailing party's attorney's fees to the losing party, as the Disclsoure Act does, "an award of fees based on a percentage of the prevailing party's recovery is improper." *Id.*

Here, it is undisputed that the Disclosure Act is a fee-shifting statute. It is also undisputed that Sarb was the prevailing party on her claim for violation of the Disclosure Act, and the jury awarded her $70,000.00 in damages. (Verdict Form). Therefore, as the prevailing party, Sarb is entitled to an award of attorney's fees and costs. Whether or not the jury decided that Sarb had not sufficiently proven her remaining claims is immaterial to her potential entitlement to attorney's fees and costs under the Disclosure Act. That being said, the amount of Sarb's award of attorney's fees is one of the various issues on appeal, and is further discussed in Respondent/Appellant's Initial Brief *as Appellant*. Therefore, Sarb adopts and incorporates by reference Section III of the Argument presented in her Initial Brief as Appellant, which is of record with the Court.

Lastly, since Sarb was successful in proving a violation of the Disclosure Act, the trial court did not err in awarding her as the prevailing party "court costs" pursuant to the Disclosure

Act. S.C. Code Ann. § 27-50-65. Rule 54(d), SCRCP, states, "[e]xcept when express provision therefor is made either in a statute or in [the South Carolina Rules of Civil Procedure], costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Under the plain meaning of this rule, costs taxed by Sarb need not be expressly authorized by statute or the South Carolina Rules of Civil Procedure, but instead are allowed except when an express statute or rule of civil procedure prohibits them. Further, subsection (e) provides that, "all sanctions including reasonable attorneys fees, if ordered, imposed upon another party and in favor of the prevailing party under any statute or Rule of Civil Procedure are taxable." Rule 54(e), SCRCP. Therefore, the language of both subsections (d) and (e) of Rule 54, SCRCP, are not limitations on the costs allowed to be taxed by the prevailing party, but are instead guidelines describing what costs must be taxed on the non-prevailing party. *Id.* The Phillips' assertion that subsections (d) and (e) are intended to specifically limit the costs allowed to Sarb for and exclude: (1) transcripts of depositions; (2) detailed attorney jury list; (3) fees charged by third parties for records in responding to subpoenas and FOIA requests during pendency of the suit; and (4) trial preparation and affidavit costs of Sarb's expert Glenn Stewart, is without merit because the language of subsections (d) and (e) was clearly not intended to limit allowable costs to those specifically enumerated by statute or Rule of Civil Procedure. Rather, these subsections lay out a guideline of costs that must be taxed against the Phillips without providing an express limitation as to what other costs are also taxable. Id. Therefore, because Sarb was the prevailing party pursuant to S.C. Code Ann. § 27-50-65, the trial court was well within its discretion taxing said costs to the Phillips.

Notwithstanding the foregoing, the insufficiency of Sarb's award of costs is another one of the various issues on appeal, and is further discussed in Respondent/Appellant's Initial Brief *as*

Appellant. Sarb adopts and incorporates by reference Section III of the Argument presented in her Initial Brief as Appellant, which is of record with the Court.

CONCLUSION

Based on all of the foregoing, and any other reasons apparent to the Court, Respondent/Appellant respectfully asserts that this Court must affirm the trial court's order as to the denial of Appellant/Respondents' motions for directed verdict and JNOV. Respondent/Appellant further requests that the trial's courts determination of Respondent/Appellant as the prevailing party be affirmed, but requests that the trial court's award of attorney's fees and costs to Respondent/Appellant be modified or remanded for further consideration as further requested in Respondent/Appellant's Initial Brief *as Appellant*.

Respectfully submitted,

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