

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.

RESPONDENT/APPELLANT’S INITIAL REPLY BRIEF

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INTRODUCTION

Respondent/Appellant Barbara L. Sarb (“Sarb”) responds to the arguments asserted in the Appellants/Respondents’ Response Brief as Respondents (“Response Brief”) of Julie W. Phillips and Joseph M. Phillips (collectively, the “Phillips”). Sarb incorporates and reiterates all of her arguments on all of the issues as set forth in her Brief as Appellant and Brief as Respondent.

ARGUMENT

I. THE PHILLIPS INACCURATELY REPRESENT AND MISCHARACTERIZE SARB’S CLAIMS REGARDING THE AFFECTED AREAS OF THE SUBJECT PROPERTY AND SARB’S OBLIGATIONS PURSUANT TO THE PURCHASE AGREEMENT.

In their Response Brief, the Phillips misstate in their statement of “facts” that the Purchase Agreement, Housemaster and CL-100 reports “insisted” or otherwise required that Sarb perform additional inspections prior to the purchase, and that Sarb’s failure to do so constitutes a breach of her obligations under the Purchase Agreement.

First, in addition to there being no duty that Sarb “adequately inspect” the Subject Property under the Purchase Agreement, Sarb had no obligation to obtain a due diligence inspection, an ancillary inspection, or an environmental inspection prior to purchase. (*See generally* Pl. Trial Ex. 2). While Sarb, as the buyer, had the right to perform not only visual, non-destructive and ancillary inspections, she was not under any obligation to perform *any* inspections other than the CL-100 inspection. (Pl. Trial Ex. 2, pg. 11). Further, there is no provision under the Purchase Agreement providing that Sarb’s undertaking of a standard, non-destructive inspection necessitates her to perform any further specialized inspections prior to purchase.

Additionally, the Phillips assert that the Housemaster Report put Sarb on notice that there were issues with the “roofing, plumbing, HVAC, etc.” (App/Resps’ Reply Br., p.3). It should be

noted that Sarb did not claim any damages for the Phillips' misrepresentations as to the conditions of the roof and the HVAC units and Sarb conceded that she was on notice of any potential issues to these components *only*. (T2 at 141:16 – 149:3; 572:1-10). Nevertheless, there is no indication in the Housemaster Report that there were potential issues with the plumbing systems (or basement flooding). (*See generally* Pl. Trial Ex. 6). Indeed, under Section 12 of the Housemaster Report pertaining to "Plumbing Systems", the inspector found that the: (1) water piping; (2) water flow at fixtures; (3) drain/waste piping; (4) fixture drainage; and (5) exterior faucet(s) were all "satisfactory" based on his inspection. (Pl. Trial Ex. 6, pg. 28). Furthermore, the Housemaster Report contained a disclaimer that provided as follows:

SELLER DISCLOSURE – This report is **not a substitute for Seller Disclosure**. A Property History Questionnaire form may be provided with this report to help obtain background information on the property in the event a full Seller Disclosure Form is not available. The buyer should review this form and/or the Seller Disclosure with the owner prior to closing for clarification or resolution on any questionable items. A final buyer inspection of the house (prior to or at the time of closing) is also recommended.

(Pl. Trial Ex. 6, pg. 3) (emphasis in original).

The Phillips argue that Sarb's awareness of potential issues with the roof and HVAC units should have alerted her to possible problems with the plumbing system. They continue to assert, erroneously, that the inspector's findings regarding the roof and HVAC mandated Sarb to conduct further inspections on all portions of the Subject Property, even those deemed satisfactory by Housemaster and those that the Phillips indicated on the Disclosure Statement had no problems. The Phillips argument is essentially that Sarb failed to inspect thoroughly enough to uncover their lies. These arguments are without merit. Housemaster performed a standard inspection of the plumbing systems, deemed them satisfactory, and expressly stated that the inspection report is not a substitute for the Phillips' disclosures. As discussed more fully in her Brief as Appellant, there

was more than sufficient evidence presented at trial that the Phillips had actual knowledge of problems with the plumbing systems, yet they misrepresented this knowledge on the Disclosure Statement to Sarb's detriment and in violation of the *South Carolina Residential Property Condition Disclosures Act*, S.C. Code Ann. § 27-50-10 *et seq.*, (the "Act"). (Pl. Trial Ex. 3).

II. THE PHILLIPS INACCURATELY REPRESENT AND MISCHARACTERIZE SARB'S ARGUMENT PERTAINING TO THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES AND COSTS TO THE PHILLIPS.

With respect to Sarb's argument as to the trial court's award of attorney's fees and costs craving reference to the verdict form, the Phillips mischaracterize Sarb's argument to this Court, while simultaneously claiming that the argument is unpreserved.

Sarb has never taken the position on appeal that there were deficiencies in the verdict form, nor is Sarb asking this Court to rule on any such alleged deficiencies or errors. Rather, Sarb's position is that the Phillips are not entitled to an award of attorney's fees and costs under the Purchase Agreement, because, in addition to the other reasons stated in her Brief as Appellant, no breach of contract claim was ever submitted to the jury for determination. A plain reading of the verdict form shows that the Phillips presented one (1) claim to the jury for "Failing to Adequately Inspect the Property." (Verdict Form). The *only* claims for breach of contract submitted to the jury for determination were those brought by Sarb against the Phillips, for which the jury found the Phillips not liable. (*Id.*). If the Phillips wished for the jury to determine whether Sarb was liable for breach of contract, and to collect attorney's fees and costs pursuant to the same, then it was the *Phillips'* responsibility, as the counterclaimants, to ensure that the verdict form was accurate and clear that the jury was rendering a verdict as to the Phillips' breach of contract counterclaim. The Phillips failed to do so and of course Sarb did not do so as that would be against Sarb's interest. As such, Sarb was never found to have defaulted or breached the Purchase Agreement, and the trial

court erred as a matter of law and abused its discretion in awarding attorney's fees and costs to the Phillips under the Purchase Agreement, finding that such an award was mandatory. (Order Granting Fees and Costs).

III. THE PHILLIPS CONTINUE TO INACCURATELY REPRESENT THAT THEY ARE ENTITLED TO MANDATORY ATTORNEY'S FEES AND ALL COSTS PURSUANT TO THE PURCHASE AGREEMENT.

The Phillips continue to argue that they are entitled to attorney's fees and ALL costs pursuant to the Purchase Agreement. This argument lacks merit and is not supported by the terms of the Purchase Agreement. The Phillips cannot and have not cited any specific provision or page number within the Purchase Agreement that mandates the award of all attorney's fees and all costs because it does not exist. It appears their position is based on Paragraph 23 of the Purchase Agreement which discusses remedies in the event of a breach by either Sarb or Phillips. That provision states, in relevant part:

23. DEFAULT/BREACH

- (A) If Seller defaults in the performance of any of the Seller's obligations under this Contract ("Default"), Buyer *may*:
 - (i) Deliver Notice of Default to Seller and terminate Contract; *and*
 - (ii) Pursue any remedies available to Buyer at law or equity; *and*
 - (iii) Recover attorneys' fees and all other direct costs of litigation *if* Buyer prevails in any action against Seller.
- (B) If Buyer defaults in the performance of any of the Buyer's obligations under this Contract ("Default"), Seller *may*:
 - (i) Deliver Notice of Default to Buyer and terminate Contract; *and*
 - (ii) Pursue any remedies available to Seller at law or equity; *and*
 - (iii) Recover attorneys' fees and all other direct costs of litigation *if* Seller prevails in any action against Buyer.

[...]

(Pl. Trial Ex. 2 at ¶ 23) (emphasis added).

Notably, Paragraph 23 states that, in the event of a breach, either Sarb as the buyer or the Phillips as the sellers, *may* pursue remedies available at law or equity and *may* recover attorney's fees and costs of litigation *if* found to be the prevailing party in any action. Thus, the *plain reading* of this provision is that, even if the Phillips' counterclaim was properly submitted to the jury as a breach of contract action and they are found to be the prevailing party, which Sarb denies, it is not mandatory for a trial court to award them their attorney's fees and all costs. Nothing in the contract requires mandatory attorney's fees be awarded to a prevailing party. Rather, the decision to award attorney's fees and costs and the amount of said award lies within the discretion of the trial court. *See S.C. Elec. & Gas Co. v. Hartough*, 375 S.C. 541, 550, 654 S.E.2d 87, 91 (Ct. App. 2007); *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989).

IV. AN AWARD OF ATTORNEY'S FEES AND COSTS WHERE ONLY NOMINAL DAMAGES ARE AWARDED IS UNREASONABLE, AN ABUSE OF DISCRETION AND NOT COMPULSORY.

As noted in her Brief as Appellant, the jury found Sarb liable to the Phillips for "Failing to Adequately Inspect the Property", and originally awarded damages to the Phillips in the amount of \$0.00, but ultimately awarded damages in the amount of \$1,000.00 upon receiving further instruction from the trial court. (Verdict Form; T2 at 571:8-19). In their Response Brief, the Phillips argue that the jury's award of \$1,000.00 constituted nominal damages, and that the existence of the award itself satisfies the damages element of their purported breach of contract claim.

Notwithstanding that the jury did not find Sarb liable for breaching the Purchase Agreement and attorney's fees and costs are not mandatory under the Purchase Agreement, the award of nominal damages as to the counterclaim does not result in a compulsory award of

attorney's fees and costs. In fact, such an award of attorney's fees and costs in this case was unreasonable and an abuse of discretion. "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all." *Farrar v. Hobby*, 506 U.S. 103, 115, 113 S. Ct. 566, 575, 121 L. Ed. 2d 494 (1992) (affirming the Fifth Circuit's reversal of a district court's award of attorney's fees to a plaintiff who won only nominal damages); *see also Cramblit v. Fikse*, 33 F.3d 633, 635 (6th Cir. 1994) (affirming a district court's denial of attorney's fees to a plaintiff who won only nominal damages); *Johnson v. City of Aiken*, 278 F.3d 333, 338 (4th Cir. 2002) (holding that a district court abused its discretion in awarding attorney's fees under § 1988 to a civil rights plaintiff who won only nominal damages). Indeed, a nominal verdict, even when increased to minimum statutory damages, deserves a nominal fee at best. *See Carroll v. Wolpoff & Abramson*, 53 F.3d 626 (4th Cir. 1995) (court's award of only \$500 in attorneys' fees was, despite mandatory nature of award under the Fair Debt Collections Practices Act, within judge's discretion when plaintiff only received statutory damages).

Thus, given the foregoing and the arguments laid out in Sarb's Brief as Appellant, even if it is determined that the award of attorney's fees and costs to the Phillips was warranted under the Purchase Agreement, the awards of \$55,393.00 in attorney's fees and \$2,310.11 in costs were unreasonable and an abuse of discretion, given the nominal verdict of \$1,000.00.¹ As such, Sarb

¹ As to the Phillips' attack on the reasonableness of the fees "the Buyer's legal team charged her" for the "very same case, very same evidence," it is worth noting Sarb was the Plaintiff with a heavy burden of proof for the causes of actions she pleaded; Sarb put up almost four days of evidence, compared to not even a half day by the Phillips and not including the additional evidence of fraud and misrepresentations Sarb was prepared to present that Judge DeBerry erroneously prevented Sarb from presenting. The Phillips also erroneously state "two partners within the same firm handl[ed] depositions, mediations and trial." Only one attorney handled or billed Sarb for the depositions and the two mediations. Both partners participated in the four-day jury trial.

requests that the award to the Phillips be reversed, or alternatively be modified by this Court or remanded to the trial court for further reconsideration.

CONCLUSION

For the foregoing reasons and for the reasons laid out in her Initial Brief as Appellant, Respondent/Appellant Barabra Sarb respectfully requests that this Court reject the Appellant/Respondents Joseph and Julie Phillips' arguments and grant the relief requested in her Initial Brief as Appellant.

Columbia, SC
July 15, 2024

Respectfully submitted,

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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
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APPEAL FROM THE FLORENCE COUNTY
COURT OF COMMON PLEAS

The Honorable H. Steven DeBerry, IV, Circuit Court Judge
Civil Action Number: 2020CV2101817

Appellate Case No.: 2023-001713

Barbara L. Sarb Respondent(s)/Appellant(s),

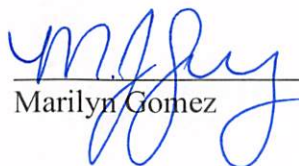
vs.

Julie W. Phillips and Joseph M. Phillips Appellant(s)/Respondent(s).

PROOF OF SERVICE

I hereby certify that on July 15, 2024, I served Respondent/Appellant’s Initial Reply Brief upon counsel for Appellants/Respondents by delivering a copy of same by electronic service to the primary e-mail addresses listed in the Attorney Information System (AIS) as follows:

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